



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

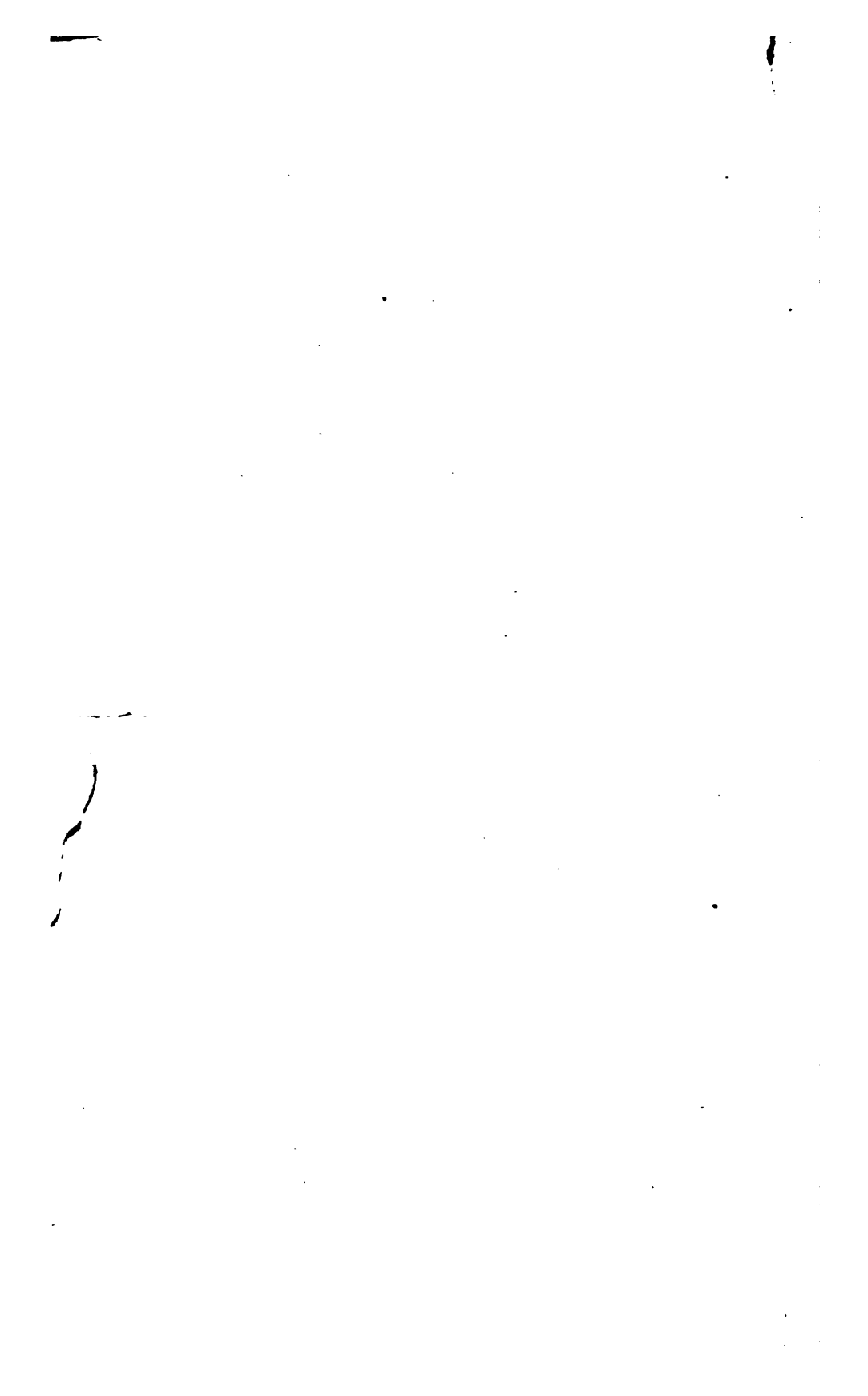
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

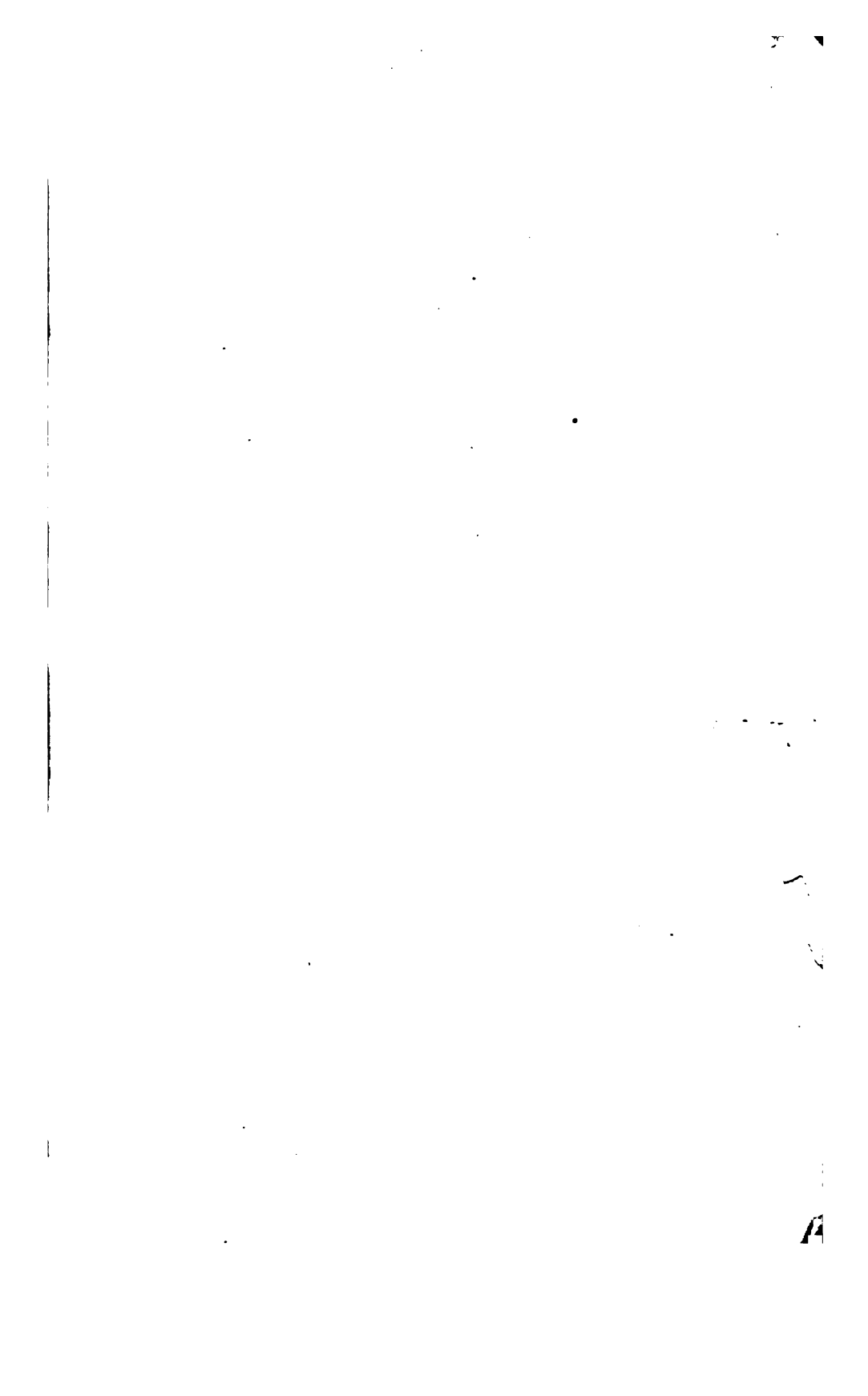


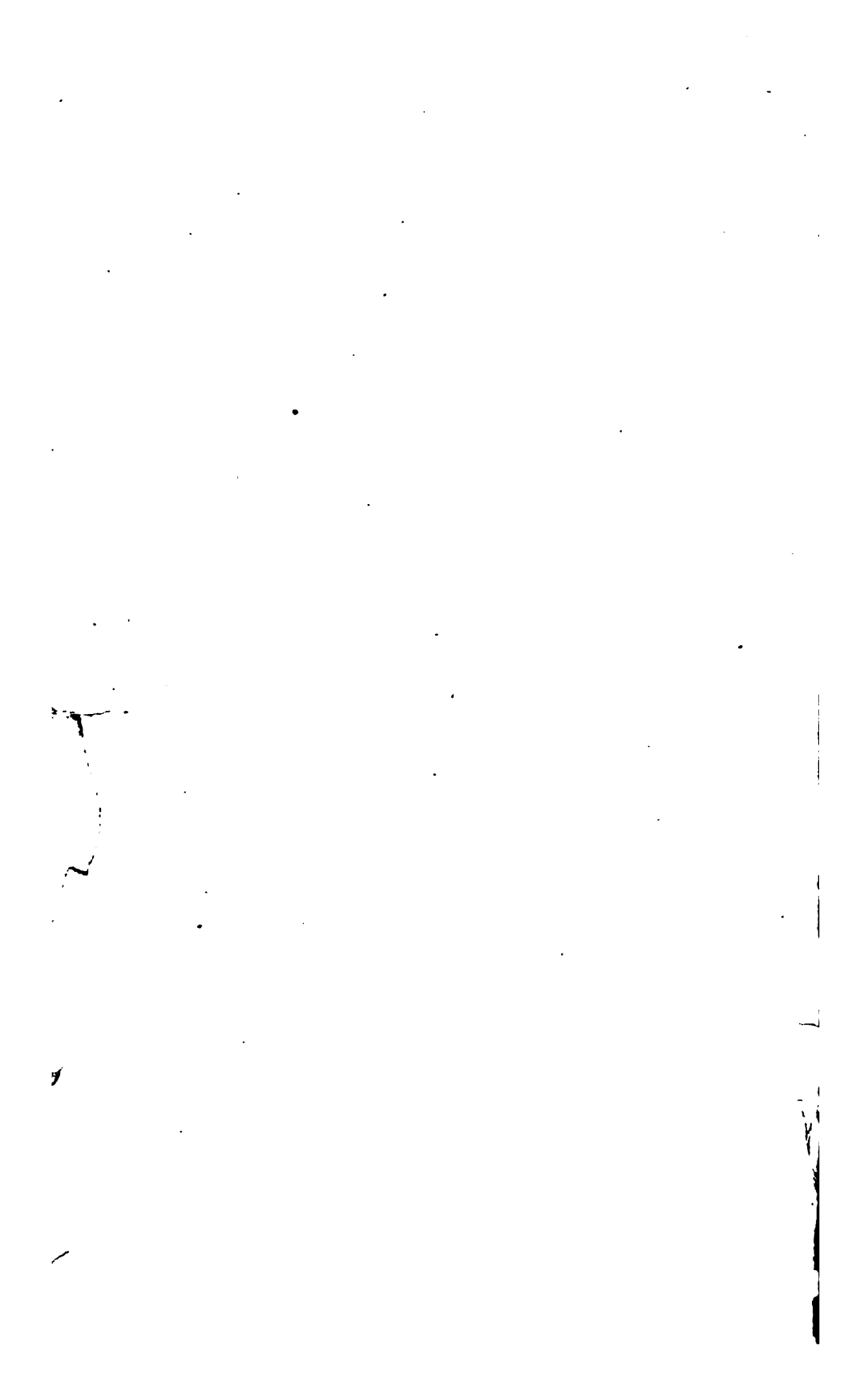
State Police

RECEIVED
JAN 10 1964

OFFICE OF THE
SHERIFF OF THE
STATE OF CALIFORNIA
SAN JOSE







REPORTS
OF
CRIMINAL CASES,
TRIED IN
THE MUNICIPAL COURT
OF THE
CITY OF BOSTON,
BEFORE
PETER OXENBRIDGE THACHER,
JUDGE OF THAT COURT FROM 1823 TO 1843.

EDITED BY
HORATIO WOODMAN,
OF THE SUFFOLK BAR.

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.
1845.

Entered according to Act of Congress, in the year 1845,
By GEORGE M. THACHER,
in the Clerk's Office of the District Court of the District of Massachusetts.

93138

BOSTON:
PRINTED BY FREEMAN AND BOLLES,
WASHINGTON STREET.

P R E F A C E .

THE following volume has been prepared at the suggestion of several professional gentlemen, who were acquainted with the nature and importance of many of the questions decided in the Municipal Court of the city of Boston, during the period in which the late Judge Thacher presided over that tribunal. It has been thought that a selection from the opinions and charges delivered by him, during the long period of his judicial labors, could hardly fail to be valuable as a contribution to criminal law in the United States ; as well from its containing the results of an experience of twenty years exclusively devoted to that branch of the law, as from the extensive jurisdiction of the court over which he presided. It has been thought, also, that this volume may have a general interest, as a record of the principal criminal cases which have been subjects of interest or excitement to the people of the city of Boston, during that time ; from its local reminiscences, and from the light which it may throw upon the history of the city, during that period.

The Municipal Court was established in the year 1799, on account of the great delays and expenses in administering justice in the town of Boston. The jurisdiction was at first very limited. In 1812, it was extended, concurrently with the jurisdiction of the Supreme Judicial Court, to all criminal cases in the county of Suffolk, not capital. Appeals to the Supreme Court were originally allowed generally, afterwards much limited, and by the statute of 1839, c. 161, were abolished, except on questions of law, to be carried up by exceptions filed of record. The court had jurisdiction also of cases of lunatics to be sent to the Worcester State Asylum, and cases of additional sentences to be imposed on second and third comers to the State Prison, convicted in any of the courts of the Commonwealth. The first judge of the court was George Richards Minot, who held the office from its establishment to his death in 1802. Thomas Dawes was then appointed, and presided from that time to the year 1822, when he resigned. Josiah Quincy was the next judge, and held the office from January, 1822, to his resignation in May, 1823.

PETER OXENBRIDGE THACHER was commissioned as judge of the court on the fourteenth day of May, 1823. He was then forty-six years of age. He had commenced the practice of the law in 1802, and in the year 1807 was chosen "town advocate," for the town of Boston, which office he held during eight months of

that year, and again, upon a subsequent election, from 1809 to 1811. That officer was at first annually elected by the people of Boston, and was the prosecuting officer in the Municipal Court. Judge Thacher continued in the constant performance of his duties as the judge of that court from his appointment until his death on the 22d day of February, 1843. During this time he was distinguished for his earnest study and thorough knowledge of the criminal law and its practical application, and for entire fidelity and devotion to the arduous duties of his office; and in the many cases which were tried before him, important in themselves and exciting to the community, his course was eminently marked by integrity and firmness of purpose, and a conscientious and fearless administration of justice.

The opinions and charges from which the following cases have been selected were left by Judge Thacher carefully drawn up, though not prepared for the press. They were preserved by him, however, with a view to their ultimate publication. It has been the endeavor of the editor to select those cases which would be of most value to the legal profession, and at the same time to pay a due regard to their general interest and importance. His principal duties have been, to prepare the marginal notes, the statements of cases, the arguments of counsel, and the index. The statements and arguments have been mainly derived from the

minutes of the judge, though occasionally from other sources. It is, perhaps, to be regretted, that comparatively few arguments of counsel could be given at any length, and that in many cases they do not appear at all ; but it will readily be seen that this was unavoidable in a volume extending over so long a period, and where in most instances there were no other reports than those of the judge. Aid has been derived, however, in many cases, from the newspapers of the day, from pamphlet reports, and from briefs of counsel. It has been difficult, in some instances, to obtain and to verify the statements of cases and the facts generally, by means of the records of the court and other sources ; but it is believed that they will be found in every material respect entirely correct.

H. W.

Boston, September, 1845.

TABLE

OF THE CASES REPORTED.

William Barnicoat v. Six quarter casks of Gunpowder	596
Commonwealth v. Francis Aglar and another,	412
“ v. Daniel Arlin	289
“ v. William Barnard	431
“ v. Isaac O. Barnes and others	516
“ v. Origen Batchelder	191
“ v. Stephen Bean	85
“ v. Morris Benesh	684
“ v. William Boott	390
“ v. John Bowden, Appellant	9
“ v. Selden Braynard	146
“ v. Joseph T. Buckingham	29, 51
“ v. Nelson H. Canfield	510
“ v. Jerusha Chase	267
“ v. Vinson Chandler	187
“ v. Henrietta Curtis and another	202
“ v. Michael Cutler	137
“ v. James Dennie	165
“ v. Moulton H. Dockham	238
“ v. Simeon Drake and another	485
“ v. Josiah Dunham Jr.	513, 519
“ v. Josiah Dunham and others	516
“ v. Joseph Farley	654
“ v. Joseph Francis	240
“ v. Thaddeus P. French	163
“ v. Nathaniel Goddard	420
“ v. Ephraim Goodenough	132
“ v. James Grant and another	438
“ v. Aaron Guild	329
“ v. Chester Harding, Appellant,	270

Commonwealth v. Israel Hershell	70
“ v. Robert C. Hooper	400
“ v. John Hunt and others	609
“ v. Ephraim Hyde and another	112
“ v. Artemas Hyde and another	19
“ v. Lucretia Jackson, Appellant	277
“ v. Charles Jenkins and others	118
“ v. Timothy Johnson	284
“ v. Abner Kneeland	346
“ v. Ezekiel F. Lancaster	428
“ v. Nathaniel Low	477
“ v. Mayor and Aldermen of the City of Boston	298
“ v. William Merrill <i>alias</i> William Swett	2
“ v. Luke W. Moocar	410
“ v. Josiah Nightingale, Appellant	251
“ v. John M. Parker	24
“ v. Horatio W. Percival and others	293
“ v. Joshua Pollard	280
“ v. Benjamin T. Prescott	507
“ v. Otis G. Randall	500
“ v. John Read	180
“ v. Robert Riley	67
“ v. Patrick Riley and another	471
“ v. Jonathan P. Robinson	230
“ v. John Robinson and another	488
“ v. Hosea Sargent and others	116
“ v. William J. Snelling	318
“ v. Phineas J. Stone	604
“ v. John Thompson and another	28
“ v. Martin L. Twombly	222
“ v. James Wallace	592
“ v. Benjamin S. Weld	157
“ v. Joseph A. Whitmarsh	441
“ v. George C. Whitney	588
“ v. John Williams	84
“ v. John Woodbury and another	47
“ v. Gideon Woodward and others as principals and William Stickney as accessory	63
“ v. William Worcester, Appellant	100
“ v. William Wright and another	211
“ v. Maverick Wyman and another	432
John Hoch, Petitioner v. Nancy J. Lord	263
Nancy J. Lord v. Henry Schweiring, Appellant	26
John F. Trueman and another v. 403 quarter casks and 10 casks of Gunpowder	14

THACHER'S CRIMINAL CASES.

MUNICIPAL COURT OF THE CITY OF BOSTON.

MAY TERM, 1823.

COMMONWEALTH v. WILLIAM MERRILL, alias WILLIAM SWETT.

Where, after a jury had been empaneled to try the issue, the evidence on the part of the commonwealth finished, and the prisoner called on for his defence, one of the jurors was attacked with a sudden illness, and dismissed by the court, and the jury was consequently discharged, a new jury empaneled, and the prisoner tried ; it was *held*, that this was not contrary to law, nor repugnant to that clause of the constitution of the United States, which declares that " no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb."

Where, on the trial of a person for shop-breaking in the night-time, it appeared in evidence, that violence had been offered to the door, and that it had been forced open ; it was *held*, that the jury might infer that the door had been duly closed on the night of the felony.

Where an officer would be liable, as a trespasser, for arresting a prisoner, if arrested wrongfully, the objection to the officer as a witness, on the trial of the prisoner, goes only to his credibility, and not to his competency.

THE prisoner was indicted for the crime of breaking and entering the store of Heywood and Fisher, in Boston, in the night-time. The trials occupied nearly two days. The principal witness for the commonwealth was Samuel Lumbard, of Montpelier, Vermont, a waggoner, who was employed by Merrill to

Commonwealth v. Merrill.

carry him and the goods to Canada, on the night on which they were taken from the store. The other witnesses for the prosecution were Heywood and Fisher, Watson Jones, of Vermont, and Alexander Kilborn, of Canada, a lieutenant in the militia, having authority to serve warrants. The prisoner had been arrested in Canada, by Kilborn, by whom great exertions were made to take him. The evidence of Lumbard was corroborated by a series of other evidence, and the prisoner was convicted. A motion in arrest of judgment was made by the prisoner's counsel, the grounds of which will appear in the opinion of the court.

James T. Austin, county attorney, for the commonwealth.

Samuel D. Parker, counsel for the prisoner.

THACHER, J. The prisoner has moved the court to arrest the judgment in this case, and for his discharge, for the cause that after a jury had been once empaneled to try the issue, one of the jurors was discharged by the court, and a new jury was afterwards empaneled to try the issue, by whom the present verdict has been rendered. It is alleged by the prisoner, in his motion, that the same was contrary to law, and in violation of that principle of the constitution of the United States, which declares, "that no person shall be subject for the same offence to be twice put in jeopardy of life or limb."

I have been the more anxious to revise the proceedings in this case, as it was the first which came up for trial, before me, after I took my seat on this bench ; — and I should deeply regret, if, from inexperience, or from any other cause, the rights of an individual should have been in any degree prejudiced.

It appears from the record, that after a jury had been empaneled to try the issue in this case, the evidence on the part of the commonwealth finished, and the prisoner's counsel had been called on for his defence, William Dunn, one of the jurors on the panel, was attacked with a hemorrhage of the lungs, and prayed the court to be instantly permitted to return to his home.

Being examined on oath, he declared that he could not remain in court, but with immediate and extreme danger to his life, and that it would not be possible for him to resume his duty as a juror at the present term. It was known to the court, that Mr. Dunn had formerly been a physician in the naval service of the United States, that he was at this time an eminent druggist in this city, and that he had been subjected to one or more similar attacks of bleeding at the lungs within the last year. The juror was immediately discharged from attendance. The attorney for the county offered to proceed in the trial, with the eleven remaining jurors, to which the prisoner did not consent. The jury was then discharged by the court, and the prisoner was informed that a new jury would be empaneled to try the case, and that the trial would proceed at nine o'clock the following morning. A new jury was accordingly empaneled at that time, and they have rendered the verdict, on which the present motion is founded.

Neither the counsel for the prisoner, nor the attorney for the commonwealth, have argued the points of law which arise out of this motion. They have been willing to rest its fate on the more deliberate revision, which the court might bestow on the case. In the absence of that light which is always to be derived from the interest which learned and faithful counsel take in behalf of their clients, I have examined the question with as much attention, as the shortness of the time and my leisure since the trial would permit.

I most fully respect the principle, contained in the fifth article of the amendments to the constitution of the United States, which declares "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;—nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." I consider this provision to be binding on this court, in the administration of justice, and that by the latter clause is meant, "that no man shall be twice tried for the

Commonwealth v. Merrill.

same offence." But it is a principle of law, well established, that on every indictment against a citizen, whether for felony or misdemeanor, there shall be one legal trial, on which a final judgment may be rendered of acquittal or conviction. In this case no such trial had taken place. The proceedings were arrested in their progress by the sudden illness of one of the jurors, before the prisoner had made his defence, and consequently before a verdict could be rendered.

It would be a reflection on the administration of justice, if a person charged with a great crime, should be permitted to avail himself of the occurrence of a physical accident like the present, to escape from the retribution of justice. But I apprehend our law is not liable to such imputation.

The law on this subject has been recently fully examined and illustrated by the supreme court of the state of New York, in the case of the *People v. Robert Goodwin*, (18 Johns. 187.) Goodwin was charged with the crime of manslaughter. The jury, after deliberating so long on his case as to preclude a reasonable expectation that they would agree on a verdict, unless compelled to do so by famine or exhaustion, were discharged. The unanimous opinion of the court was, that he might again be tried by another jury, and he was accordingly again subjected to a trial. Spencer, C. J., after an examination of the authorities, declares "that although the power of discharging a jury, is a delicate and highly important trust, yet it does exist, in cases of extreme and absolute necessity; that it may be exercised without operating as an acquittal of the defendant; and that it extends as well to felonies as misdemeanors." In the case of *The People v. Olcott*, (2 Johns. Cases, 301,) Kent, J. observes: "All thea uthorities admit, that when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and whether the mental inability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same." Again, he observed: "Every question of this kind

must rest with the court, under all the particular or peculiar circumstances of the case. There is no alternative. Either the court must determine, when it is requisite to discharge, or the rule must be inflexible, that after the jury are once sworn, no other jury can, in any court, be sworn and charged in the same case. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity, and to determine what combination of circumstances will create one."

This point was argued before all the judges of England, except Mansfield, C. J. and Lawrence, J., in 1812, in the case of *Rex v. Edwards*, (4 Taunt. 309.) The indictment was for a felony. While the prosecutor was giving his evidence, one of the jurors fell down in a fit, and he was pronounced by a physician on oath, incapable of proceeding in his duty as a jurymen on that day, whereupon the jury was discharged, a new jury was sworn, and the defendant was convicted. The point, whether the prisoner could be tried, after the discharge of the jury, without consent, was argued; all the cases were cited, and the judges, without hearing the counsel for the crown, said, that it had been decided in so many cases, it was now the settled law of the country, and gave judgment against the prisoner. The same course was adopted, upon nearly the same state of facts, in *Ann Scalbert's case*, (Leach's C. C. L. 706); and in the case of the *King v. Stevenson*, (Leach's C. C. L. 618,) the prisoner fell down in a fit during the trial, and the jury was discharged, and, upon his recovery, he was tried and convicted by another jury. In the case of the *United States v. Coolidge*, (2 Gallis. Rep. 364,) a witness refusing to be sworn, the trial was suspended, during the imprisonment of the witness for the contempt, and Mr. Justice Story held, that the discretion to discharge a jury existed in all cases; but that it was to be exercised only in extraordinary and striking circumstances. In the case of the *Commonwealth v. Bowden*, (9 Mass. Rep. 494,) upon an indictment for highway robbery, the jury, after a full hear-

ing of the cause, being confined together during part of a day and a whole night, returned into court and informed the judge that they had not agreed on a verdict, and it was not probable they ever could agree ; whereupon one of the jurors was withdrawn from the panel, without the defendant's consent, and the jury was discharged, and during the same term another jury was empaneled for his trial, and he was found guilty. On a motion in arrest of judgment, the court refused the motion, saying, that the ancient strictness of the law upon this subject had very much abated in the English courts ; that it would neither be consistent with the genius of our government or laws, to use compulsory means to effect an agreement among jurors ; and that the practice of withdrawing a juror, where there existed no prospect of a verdict, had frequently been adopted in criminal cases in that court.

Upon a full examination of the cases, I am satisfied, that the course which I pursued in this trial was according to the acknowledged principles of law, as practised upon by the supreme judicial tribunals in this commonwealth, and that it conforms to the practice in similar cases in New York and Great Britain. I feel myself bound by these authorities — *Eadem lex Romæ, eadem Capuæ*. The motion in arrest of judgment and for the prisoner's discharge is overruled.

A motion was also made for a new trial, on which the court delivered the following opinion.

THACHER, J. Without undertaking to settle the question, whether a new trial can be granted after a verdict rendered in this court on a case originating here, from the judgment of which there is a remedy by appeal ; I will consider the grounds set forth in the defendant's motion, on which a new trial is claimed.

The first cause assigned is, that the verdict was rendered against the weight of evidence, in three respects. 1. "That no evidence was offered at the trial, that the store of Heywood and Fisher was closed on the night of the 8th of February

last." It is true, that the person who closed the store was not produced, to testify to that fact, and it was matter of some surprise to me at the trial. In general, it is not safe to proceed in a trial of so much consequence, without this evidence, where it can be produced. But there was evidence at the trial, that great violence had been offered to the outer door of the store. The locks had been violently wrenched off, and the door had been forced open with some powerful instrument, and with great force. I think that this was competent evidence, from which the jury might infer, that the store had been broken and entered with violence; for, on any other hypothesis, there was no ground to account for the marks of violence which were apparent on the door of the warehouse. 2. "That there was no evidence, that the store was broken and entered *in the nighttime*." But I consider that the jury could fairly infer from the testimony that the breaking and entry did take place in the night. Mr. Fisher left his store at about six o'clock in the evening. Lumbard and Edwards arrived at Hatch's tavern, in Boston, at dark, and the horse and sleigh were left in Edwards's possession. Between nine and ten o'clock that evening, Merrill and Edwards overtook Lumbard by the court-house, in Cambridge, near Craigie's bridge, on their way to Brighton. From the testimony, the jury might fairly infer *the noctanter*. 3. "There was no evidence that Merrill was ever in the store, or had any connection with it, or that he was in possession of the goods within the county of Suffolk." But it was proved by the testimony of both Heywood and Fisher, that the goods were in the store at six o'clock that evening, and it appeared, from Lumbard's testimony, that they were in Merrill's possession at ten o'clock the same evening, he driving with all haste from Boston, and at one o'clock of that same night he commenced his flight for Canada. From these facts in the case, which must now be considered as established, a violent presumption arises, that Merrill took the goods from the store. The burden of proof was entirely shifted, and he was bound to ac-

Commonwealth v. Merrill.

count for the possession of the goods, or it will necessarily and legally follow, that he obtained them by the commission of the felony which has been charged, and which is now established by the verdict of the jury, to have been committed within the county of Suffolk.

The second cause assigned, as the ground of the motion for a new trial, is "that Lumbard was admitted to be a witness for the government, upon a promise or condition, that if, by his testimony, he proved the conviction of said Merrill, he himself should be discharged." The fact here stated to have existed at the trial, is not founded in verity. Before Lumbard was sworn in chief, he was examined on the *voir dire*, and declared, that no one had given to him any promise or assurance that he himself should be discharged, on his procuring, by his evidence, the conviction of Merrill. When the cause was committed to the jury, they were instructed by the court, that if they believed Lumbard was an accomplice with Merrill, in committing the felony, they would be bound to reject his whole testimony, inasmuch as having voluntarily appeared as a witness in the case, he must have committed wilful perjury in concealing his own share of the guilt, and was therefore not entitled to credit. The verdict of the jury proves, that they did consider Lumbard was not an accomplice in the guilt of the prisoner.

The third cause assigned for the new trial is, "because Alexander Kilborn was sworn, and admitted a witness for the government, although objected to, and directly interested in the event of the trial, to procure a conviction, to justify a trespass committed on Merrill." The agency which this witness had in arresting Merrill, was derived only from his own testimony. Kilborn, an officer, in Canada, had a warrant to apprehend Merrill, and effected the arrest. The night after his capture, certain persons took him by force and carried him across the Canada line into Vermont. But Kilborn was not one of this party. He was, at the time this event happened, at the distance of a mile or two from the

Commonwealth v. Bowden.

parties. On the following morning, Kilborn crossed into Vermont, and brought Merrill, without any legal warrant, to this place. Now, admitting that this was a trespass, the verdict in this case can never be used as evidence, in a civil action between these parties, and therefore in my opinion, the objection goes only to the *credibility* of the witness, and not to his *competency*. But lest anything should be inferred from this, which would tend to prejudice the public justice, and diminish the activity of our police, I would here observe, that whenever there is good reason to believe that a felony has been committed, and that a certain individual has committed the crime, it is both justifiable and commendable in an officer of justice, to apprehend such person and convey him to a magistrate, there to be dealt with according to law.

The motion for a new trial is overruled, and the court must order the sentence of the law.¹

AUGUST TERM, 1823.

COMMONWEALTH v. JOHN BOWDEN, APPELLANT.

The statute of 1822, ch. 25, giving the police court of the city of Boston power to sentence to the house of correction persons adjudged guilty of certain offences, is not unconstitutional.

THIS case was tried August 10th, and a verdict was rendered for the commonwealth. The counsel for the appellant, filed a

¹ As to granting a new trial, vide Chitty, 654; 13 East, 416, n. (b.); *Blackquiere v. Hawkins*, (1 Doug. 378,) per Lord Mansfield: "Inferior courts cannot grant a new trial."

On the right to bring a writ of error—in what cases it will lie, see *Savage v. Gulliver*, (4 Mass. Rep. 171,) Parsons, C. J., p. 178;—no writ of error will lie where the party had a remedy by appeal.

The statute giving an appeal must be construed as taking away the remedy by error, in all cases, in which the party aggrieved had opportunity, and might have appealed. Parsons, C. J. *Champion v. Brooks*, (9 Mass. Rep. 228.)

Commonwealth v. Bowden.

motion in arrest of judgment. The facts of the case will appear from the opinion of the court.

James T. Austin, for the commonwealth.

Andrew Dunlap, for the defendant.

THACHER, J. This case is brought here, by appeal from a judgment of the police court. The charge in the original complaint is, that John Bowden, on the 28th July, 1823, in a certain house on Southac street, in this city, sold liquors, part of which was spirituous, to divers persons, he not being first duly licensed; and that the house was, and for a long time before had been, used for the purpose of tippling, and for the general resort of loose, lascivious, wanton and dissolute persons, against a statute of this commonwealth.

The verdict of the jury has established the truth of the facts alleged in the complaint. The defendant, by Mr. Dunlap, his counsel, moves in arrest of judgment, in substance, that there is no law of this commonwealth, on which this judgment can be sustained. The motion sets forth, that the act of 1823, ch. 25, entitled "An act in further addition to an act, entitled "an act for suppressing and punishing rogues, vagabonds, common beggars, and other idle, disorderly and lewd persons," is in plain violation of the constitution, and that it is drawn so "clumsily" and "inartificially" with "so total disregard of legal certainty," that it cannot be the foundation of a judgment.

In the argument, it has been urged by the defendant's counsel that this act is in violation of the constitution; 1, because it makes that criminal in the county of Suffolk, and punishable there with an infamous punishment, which is not criminal or punishable in the other counties of the commonwealth; and 2d, because it subjects a citizen to be tried and convicted of an offence, to which an infamous punishment is attached, without indictment or trial by jury. It was further objected, that from the language of the act, it is uncertain on whom it is to operate;—and lastly, that it does not appear, what liquors were

intended, for the selling of which a person was to be sent to the house of correction.

The act, out of which these questions have been raised, is, I confess, fruitful in legal points. It is to be regretted that, in framing laws, care is not always taken, to write them with such precision and fulness, that every expression should, like rays of light, carry clearness and conviction to the mind of the reader.

The general act, to which this is in addition, is that of 1787, c. 54. The first additional act is that of 1797, c. 62. The second, is that of 1802, c. 22. The third of 1822, c. 83, and this, which is the fourth, is that of 1823, c. 25.

Where the legislature pass several acts on the same subject, they constitute but one law, and are all to be construed together. This general law authorizes the sending to the house of correction a multitude of disorderly persons, to be kept to hard labor, furnishes the materials for work, and provides for the government of such establishments. By the additional act of 1823, c. 25, the police court may send to the house of correction "any person selling liquor without license, in any house, shop, room or hall, used for the purpose of dancing, tippling, gambling, or for the general resort of loose, lascivious, wanton or dissolute persons." The jurisdiction of the police court being confined to this city, it is true, as alleged by the defendant's counsel, that this portion of the law can operate only within its limits.

Then, is it competent for the legislature, in making a general law, to have regard to the circumstances of different parts of the commonwealth, and to enact a more severe or different punishment for the same act, when committed in one town or county, than when committed in another? The same act may create greater mischief and inconvenience in some places than in others. This is matter of fact, which may be ascertained by the legislature. And whenever it shall appear that an act is, from any circumstances, more mischievous in its tendency, when committed in one town or county, than when committed in other parts of the commonwealth, it is, in my opinion, no

Commonwealth v. Bowden.

violation of the constitution, or of the principles of sound legislation, to make a difference in the punishment. In every part of the commonwealth, the selling of spirituous liquors without license is an offence. But it being found by experience, that within the city of Boston, the selling of liquors in houses of bad fame, the general resort of disorderly persons, tends to destroy all good morals, to increase vagrancy, and to multiply crimes ; and that the penalty in the general license law (1786, c. 68,) is in a great degree inoperative, and does not restrain offenders ; I am well satisfied, that it is both the right and duty of the legislature, in its care of general peace and safety, to enact a more severe and effectual punishment for such offence, and to confine its operation to this city. This is no extraordinary act of legislation. On this principle is justified the multitude of special acts, regulating municipal concerns, in various parts of the commonwealth—the law, which prohibits the erection of wooden buildings exceeding certain dimensions—the laws regulating quarantine—the laws which prohibit the transportation, keeping and sale of gunpowder, except under certain circumstances—and the law regulating “weights and measures.” If, upon principle, the legislature may pass laws of this description, why not a law to check the demoralizing sale of ardent spirits, in houses, used for most destructive purposes, and among a class of citizens, who are the victims of intemperance, and always ready to run to any excess of riot ?

To the second objection, on constitutional grounds, that a party may be subjected, under this act, to an infamous punishment, without indictment or trial by jury ; it is a sufficient reply, that the proceeding before the police court in this case, is agreeable to the practice ever since the adoption of the constitution, both of this commonwealth and of the United States. A party may be tried and convicted, before a justice of the peace, for petty larceny, to which is annexed an infamous punishment, and by which he is stigmatized, and forfeits his competency as a witness, in any court of justice forever after ; but being entitled to

an appeal to a higher tribunal, where he may be tried by a jury, the constitutional privilege is saved. If, on conviction in the police court, or before a justice, he does not appeal, it is a voluntary waiver of his privilege, and an acquiescence in the judgment. The appeal was claimed in this case, the defendant has been tried by a jury, and I do not perceive that he has been deprived of any right, which is secured to him by the constitution.

It was further objected in the argument, that it does not appear what liquors are intended, for selling which a person is to be subjected to this punishment. The word liquors comprehends "anything liquid." In familiar language, it means "strong drink." Connected with the expression in the act, "selling liquors without license," it clearly means the selling of liquors, for selling which, the law requires that the seller should have a license. The charge in the complaint so alleges the offence.

In examining this act, other questions have occurred to me. They appear to arise from a want of fulness of language, and from the defect of legal precision and accuracy in expression; but the meaning of the act is plain, and its object valuable. Were I to pronounce this act unconstitutional, I should establish a precedent in my mind, which would perpetually occur, whenever I should be called on to pass in judgment on any act, which is deemed to be an offence by any special act of the commonwealth. The motion is overruled.

Trueman and another v. 403 Quarter Casks and 10 Casks of Gunpowder.

AUGUST TERM, 1823.

JOHN F. TRUEMAN AND ANOTHER v. 403 QUARTER CASKS,
AND 10 CASKS OF GUNPOWDER.

Under the statute of 1820, c. 47, it was *held*, that gunpowder in a boat, driven within two hundred yards of the wharf, by the violence of the wind and waves, without the fault or negligence of the person having custody of the same, and seized within an hour afterwards, was not thus rendered liable to forfeiture.

The same circumstances will excuse the omission to display a red flag, as required by the laws of the firewards of the city of Boston.

Under the statute of 1820, c. 47, the firewards have no authority to create a cause of forfeiture, which is not authorized by the act.

THE ground of the seizure, as alleged in the libel, was, that the gunpowder was lying, at the time, within two hundred yards of the end of Long Wharf, in Boston, in a boat which had not a red flag displayed in the bow or stern, contrary to the act of 1820, c. 47, and to the rules and regulations of the firewards of the city.

Messrs. Tileston, Whipple and Hale, owners and claimants, set forth, in their answer to the libel, that the gunpowder was by them manufactured in Chelmsford; that having contracted with Daniel Hill, master of the schooner *General Brewer*, then lying in the port of Boston, and bound to Charlestown, S. C., to take this gunpowder on freight for that city, they put the same on board a canal boat, at Chelmsford, to be transported to the harbor of Boston, and there to be delivered on board said schooner in the stream; that owing to the violence of the wind and waves, without fault or negligence on the part of them, or their agents, and by inevitable necessity, the schooner was prevented from leaving the wharf and going into the stream at the time appointed; that the canal boat being likewise wholly unable to resist the wind and waves, was driven within two hun-

Trueman and another v. 403 Quarter Casks and 10 Casks of Gunpowder.

dred yards of the end of Long Wharf, and that before the boat could be removed from that place, the seizure took place. The claimants, denying that the gunpowder was had and kept contrary to law, claimed to have the facts ascertained by a jury. The issue thus tendered being joined by the libellants, the judge ordered a jury to be empaneled to try it, stating, at the time, that although the act, on which the seizure was made, did not expressly provide for a trial by jury in these cases, yet it was a right secured by the constitution generally, and therefore was not to be denied.

On the trial, it appeared in evidence, that the schooner was to have sailed on Sunday morning, July 6, and that in the afternoon previous, John Mixer, master of the canal boat, applied to Capt. Hill, and received his instructions to bring his boat early the next morning alongside of the schooner, which should be then lying in the stream ; — that the schooner was hauled down to the end of the wharf in the morning, with the intent to be got into the stream ; but that the wind suddenly shifted, and the waves becoming boisterous, it was deemed unsafe and improper to leave the wharf. In the mean time, the canal boat came from Charlestown, and being long, narrow and shallow in its construction, was wholly unfit to ride in a high sea and high wind, and from necessity made to Long Wharf. This boat was not provided with a cable and anchor, but the witnesses agreed that if she had been furnished with one, it would not have been safe to have anchored her in the stream. The boat arrived at the wharf at about half past nine o'clock in the morning, and the powder was seized and taken into the possession of the firewards in the course of one hour afterwards.

Henry Codman, for the libellants.

Lemuel Shaw, for the claimants.

Two points were raised : 1st, whether, as the gunpowder was in a boat, which had not a red flag displayed in the bow or stern, it was not for that cause liable to forfeiture ; and 2d,

Trueman and another v. 403 Quarter Casks and 10 Casks of Gunpowder.

whether the facts proved amounted to a legal excuse. The counsel for the claimants cited 9 Cranch's R. 55, 3 Wheaton, 59; *The William Gray*, from the National Intelligencer of October 12, 1810; also the record of the case, *Firewards v. 2 Casks of Gunpowder*, decided in this court, August term, 1819.

THACHER, J. The first section of the act on which this process is founded, creates a forfeiture of gunpowder, which any person shall have or possess "within two hundred yards of any wharf, or of any part of the shore on the main land," within the town of Boston. And all gunpowder had or possessed, in any way or manner other than may be permitted, by this act, and by the rules and regulations therein mentioned, is forfeited and made liable to seizure. The third section of the act authorizes the firewards of the town of Boston, to make and establish rules and regulations, "relative to the times and places at which gunpowder may be brought to or carried from such town, by land or water," and "to direct and regulate the kind of carriages, boats and other vehicles, in which the same may be so brought to, carried from, and transported through, said town," and "to direct and require all such precautions as may appear to them needful and salutary, to guard against danger in the keeping of gunpowder, and in the transportation thereof, to, from and through the town of Boston."

By the fifth section of the rules and regulations, established by the firewards on the 9th of February, 1821, "all boats employed in transporting gunpowder, shall have the casks of powder covered over with canvas, and shall have a red flag displayed in the bow or stern of the boat, so long as any powder remains on board." If this rule is to apply, as argued by the counsel for the libellants, to every boat or vessel, coming into the harbor, having gunpowder on board, then, if that article should be found on board any vessel coming into the harbor from a foreign port, or from any other port or town of the commonwealth, not having a flag displayed, it would be subject to forfeiture, even though there should be no intent to land the same

Trueman and another v. 403 Quarter Casks and 10 Casks of Gunpowder.

in Boston, or to bring it within two hundred yards of any wharf, or of any part of the main land. But I am of opinion, that the firewards cannot, by their rules and regulations, create a cause of forfeiture, which is not authorized by the act. They may require all boats to display a flag, which are employed in bringing gunpowder to, or carrying it from the town, or intending to bring it within two hundred yards of the land. Beyond that their power of regulation does not extend. Although the act is most salutary, yet being highly penal, it is to be construed strictly, and in a manner as favorable for the citizen whose property is to be seized, as is consistent with the fair principles of interpretation. Any greater latitude of construction would authorize the firewards to legislate generally on the subject, and to make new grounds of seizure, which were not contemplated by the general court. This would be contrary to the ordinary rules of legislation in this commonwealth. Receiving this from the court as a true exposition of the law, the jury must ascertain, by their verdict, whether the intention of the claimants in this case was to deliver the gunpowder in the stream, and to come within two hundred yards of the main land, in which case there would arise no forfeiture for the cause, that a red flag was not displayed on the boat.

Do the facts proved in this case amount to a legal excuse? Because a quantity of gunpowder is found at a place within the city on land, or within the distance of two hundred yards from the land, on the water, it does not necessarily follow, that the article is liable to forfeiture. It is the duty of the firewards, in almost every instance, to seize the article, when found within the prescribed limits, and contrary to the regulations of the board. But if on trial it should be shown, that the powder was carried to the place, without the will of the owner, and by one who acted without his knowledge or consent, by a trespasser or felon, for example, the law is not in such case so unreasonable as to deprive the citizen of his property. In the present case, if the jury should be satisfied, that the boat was driven to the

Trueman and another v. 403 Quarter Casks and 10 Casks of Gunpowder.

place where she was found by the violence of the wind and waves, without the fault or negligence of the person who had the custody of the same, it was to be considered as an inevitable necessity, that there was no fault of the will, and consequently that no forfeiture had accrued. The jury were then to inquire whether the canal boat was proper for the transportation of gunpowder; whether it was sufficiently manned, and supplied with the usual material for safe navigation; whether, if it had been furnished with a cable and anchor, it might not have proceeded to Williams Island, and there lain safely at anchor on the flats till the wind and waves had subsided; whether the schooner was prevented from proceeding to the stream, and the canal boat driven to the wharf by accidents, beyond the control and without the fault of the several persons having charge of those vessels; and lastly, whether the boat was permitted to remain at the wharf for an unreasonable length of time after the accident had occurred, and before the seizure was made. Upon the verdict of the jury, by which the facts in the case would be established, a decree would be made according to law.

The verdict of the jury was on all these points in favor of the claimants, and therefore the court decreed that the gunpowder should be restored to them. No appeal was entered. No damages were demanded, and each party agreed to pay their own costs.

AUGUST TERM, 1823.

COMMONWEALTH v. ARTEMAS HYDE AND ANOTHER.

On the trial of an indictment for gaming, it is not necessary to prove the precise day, if the offence be proved to have been committed before the finding of the indictment.

The declarations of a person indicted for keeping a *faro bank*, made publicly at the time of the offence, that he was playing as the agent of another, are inadmissible as evidence in his defence.

A person occupying one room only of a house, and keeping a *faro bank* therein, for public resort, is within the statute of 1798, c. 20, although the words of the statute are "keeping a house;" and although there be no proof of his paying rent for the room.

Where several persons keep a common gaming house, they may be jointly or separately indicted, but if jointly indicted, they are to be considered as tried separately, and each is to pay the same penalty, and suffer the same consequences, as if it had been his sole act.

THE defendants were indicted on the second section of the act of 1798, c. 20, "more effectually to prevent the pernicious practice of gaming." The first count charged the defendants, "that on the 25th of January, 1823, they did actually occupy a certain building commonly known and described as No. 66 Ann street, in Boston, and did permit persons to resort to the same, to play at a certain unlawful game called *faro bank*, for the gain and hire of the said Hyde and Jones." The second count charged the like offence as committed in a part of a certain building in Boston, on the 27th of January, 1825.

At the trial, witnesses testified to the fact, that there was a *faro bank* establishment at the place named in the indictment, at some time in January last, and prior to the finding of the indictment, which was at the last February term, from which it has been continued to the present time. The counsel for the defendants objected to any evidence of the keeping of a *faro bank*, except on the days mentioned in the indictment. He said that other indictments were pending against the defendants

Commonwealth v. Hyde and another.

for the like offence, committed on other days specified in the month of January, 1823 ; and if the defendants could be convicted on this loose evidence, the same testimony would be applicable to all those indictments also, and they might be convicted on all. I overruled this objection on the ground, " that the time did not enter into the nature of the offence, and therefore it was not necessary to prove the precise day." (1 Chitty C. L. 224 ; Fost. 8 and 9.) All that is necessary, is to prove that the house was kept by the defendants or one of them for a faro bank, at some time prior to the finding of the indictment. If the defendants or either of them should hereafter be put on trial for the same offence, it would be the duty of their counsel to plead the conviction or acquittal in this case, if the facts would support the plea ; and the court would see, that the defendants were not twice put in jeopardy for the same offence.

Caleb Hayward was offered as a witness on the part of the prosecution. The counsel for the defendants objected, that he was interested in the event, because part of the penalty would go to him, and he moved that the commonwealth's attorney should be sworn to prove that fact. But that officer declared that he had no knowledge of any fact in the case, except what had been communicated to him, as the counsel and attorney of the government, and he was not sworn.¹ Hayward was then sworn, and on being examined as to his interest, said, that by a vote of the mayor and aldermen of the city, one half of the penalty, when paid, would be received by him, but that he was under a contract to pay it over to a person, who had informed him as the police officer against the defendants. On a further inquiry he said that the informer had not been examined as a witness in the cause.

It was not shown at the trial, by the testimony of any witness, who hired this room, and paid the expenses ; nor indeed, did

¹25 State Trials, *The King v. John Horne Tooke*, for a libel.

it appear, who hired the house. But it did appear, by the testimony of all the witnesses, that this faro bank was kept generally by the defendants, and that they had the general credit of the establishment. But an air of mystery and secrecy was thrown over the whole, so that it was left to the jury to form their opinion from circumstances, without the aid of direct and positive testimony.

The defendants' counsel inquired of a witness for the defendants, "if Hyde did not usually proclaim, at the commencement of an evening's play, that he was not playing for his own account, but as agent for some other person." On objection to this question, the court decided that it was an improper one, because the declaration of the defendants was not the best evidence, which the nature of the fact required, to clear him from the legal consequences of his conduct, nor was it any evidence. *The King v. Lord George Gordon*, (21 State Trials, 542.)

S. D. Parker, for the defence. This is a penal statute, and is to be construed strictly. 1. Two persons cannot be joined in the same indictment for this offence. The act says, "if any person shall keep," &c. As it is in the nature of a several offence, the indictment is defective in this respect, and the prosecution must fail. 2. The time is material. The jury cannot convict, unless they believe that the bank was kept by the defendants on the 25th or 27th Jan. 1823, as alleged in the indictment. 3. The defendants are charged with keeping a *house* for gaming purposes. Now the word *same*, in the section of the act on which this charge is founded, refers, both in legal and grammatical construction, to the word *tables*, and not to the word *house*. On this construction of the act, the housekeeper, the master of the house, who pays the rent, is the offender within the meaning of the law. And there is no evidence in this case, that the defendants, or either of them, hired the room, and paid the expenses of the establishment. 4. One apartment in the house only, was occupied for this purpose. This offence cannot be committed by the occupant of one room

Commonwealth v. Hyde and another.

only. The charge should be against the landlord who lets the room. 5. Before the jury can find the defendants, or either of them guilty, they must be satisfied, that they were the keepers, and that they derived a certain profit from the establishment. Now, if all the advantage which they actually derived from it, depended on the chances of the play, the defendants might lose and not gain by the same. But the landlord, who receives the hire of the room, certainly gains, because the rent is not made to depend on a contingency.

James T. Austin, for the commonwealth.

THACHER, J. The second section of the act describes two offences: 1. Keeping a house in which the actual occupant, for his own hire, gain or reward, keeps or suffers to be kept, any tables for the purpose of playing billiards. A private person keeping a billiard table for his own amusement, and not receiving from it any profit, is not liable on this act. 2. Keeping a house, to which the occupant suffers persons to resort, for his own hire, gain or reward, for the purpose of playing at billiards, cards, dice, or any other unlawful game. The indictment is founded on this second clause, and well describes the offence. If a man actually occupies or improves any part of a house, as a room, for example, and suffers persons to resort to it for his own profit, to play at an unlawful game, he is within the statute. It is settled, that if a person is only a lodger in a house, yet if she make use of her room for entertaining and accommodating people in the way of a bawdy house, it is keeping a bawdy house, as much as if she had the whole house. *Regina v. Pierson*, (2 Lord Raymond, 1197.)

The time is not material, provided the jury are satisfied that the offence was committed before the finding of the indictment. This conviction or acquittal will be a bar to any other indictment, charging the like offence prior to that time. It is certainly so far a bar, that the burden would be entirely shifted upon the

government, to prove, that it was another offence, differing in time and place from that mentioned in this indictment.

Though two are joined in this indictment, they are to be considered as severally on trial, and the evidence against each is to be separately weighed. Where an offence is several in its nature, two cannot be joined in the same indictment. "Several cannot be joined in an indictment for perjury, because the assignment must be of the very words spoken, and the words uttered by one cannot possibly be applied to those which proceed from another." (1 Chitty, 268.) Where several persons may join in committing the same offence, they may all be joined. As where several keep a common gaming house, they may be jointly or separately indicted. (1 Chitty, 267 ; 2 H. H. P. C. 173.)

This is true as to indictments at common law, and all the rules which affect indictments at common law, relate also, in general, to those founded on statutes. (1 Chitty, 275.) It is no hardship to the defendants in this case. Suppose that both should be convicted they will be subjected to the payment only of one bill of costs between them ; whereas, on separate indictments and convictions, each would be compelled to pay a bill of costs. If they or either of them had feared that they should be prejudiced by a joint trial, they should have applied for a separate trial, which always rests in the discretion of the court to grant.

It is not necessary to prove an actual hiring or payment of rent. If circumstances exist to satisfy the jury, that the room was actually occupied and improved by the defendants for the alleged unlawful purpose, they are to be considered within the intent of the law. If it could be shown, that the landlord let this room to the defendants on a specified rent, to be used and occupied for gaming purposes, he would be answerable for the penalty. If he permitted them to occupy and improve this room for gaming purposes, in consideration of the benefit which he would derive from the resort of multitudes to a tavern kept by him in other parts of the house, he would, I think, be

Commonwealth v. Parker.

within the law. But this would not excuse the defendants. They would also be liable for the penalty, if they actually occupied and improved the room for gaming purposes, and derived a revenue from the same.

The judge was requested, by the defendants' counsel, to instruct the jury on the point, whether, if five or six persons hired an apartment for such unlawful purpose, and actually occupied it for the same, they could be made liable on conviction, to pay more than one penalty among them all? But the court considered it a separate offence in each; that all might be indicted, and that, on conviction, each would be made liable to pay the penalty, which the statute gives, and to suffer all the other consequences of the offence, as though it was his sole act.

The jury found both defendants guilty.

NOVEMBER TERM, 1823.

COMMONWEALTH v. JOHN M. PARKER.

A keeper of an intelligence office, who agreed to procure a place for an applicant in consideration of two dollars paid in advance, but with no intention to procure such a place, and, by falsely alleging that he had a situation in view, induced the applicant to pay the money, was held to be guilty of obtaining money by false pretences within the statute of 1815, c. 136. [Rev. Stat. c. 126, s. 32.]

THE prisoner was indicted under the act of 1815, c. 136. The indictment charged that he, knowingly and designedly, by false pretences and affirmations, (which were all set forth,) did obtain from one Cyrus Snell, two dollars in bank bills.

The defendant kept an intelligence office in Boston. The prosecutor, wishing to get a situation as a clerk in a store, applied to the defendant to procure one for him. The defendant showed to him a printed advertisement, by which he agreed to procure places for one dollar paid in advance, which sum was how-

Commonwealth v. Parker.

ever to be refunded in board, if the place was not procured. Snell testified that he refused to pay any money, unless he could be sure of a place. The defendant said that a grocer near the market wanted a clerk, and had authorized him to engage one, and that on payment of two dollars he might be sure of the situation. Snell paid the money; but on application to the defendant, no place was procured, no name was mentioned, nor did it appear, or was it pretended by the defendant, that any grocer had authorized him to engage a clerk. He however said to Snell, that he might take out his money in board.

THACHER, J. instructed the jury that if they believed that a contract existed between the defendant and Snell, and that the defendant honestly intended to get a place for Snell, or to insure it to him, then the case was not within the statute; and the remedy would be by a civil action to recover the money, or damages, sustained by a breach of the contract. But that if they believed that the defendant had no honest intention, from the first, to procure a place for Snell, and had none in view, but had told a series of falsehoods to him merely to deceive and defraud him out of his money, the case was within the statute

The jury found a verdict of guilty.

Austin, for the commonwealth.

S. L. Knapp, for the defendant.

Lord v. Schweiring.

NOVEMBER TERM, 1823.

NANCY J. LORD v. HENRY SCHWEIRING, APPELLANT.

In a complaint against a person, under the bastardy act of 1785, c. 66, as father of a bastard child, born in the county of Middlesex, it was *held*, that the municipal court had jurisdiction, notwithstanding the birth was out of the county.

Evidence on the part of a complainant under the bastardy act is admissible, as to her former character and conversation, and, if her testimony be contradicted, as to her general character for truth.

THIS was a complaint under the act of 1785, c. 66, to compel the defendant to assist in the maintenance of a female bastard child, alleged to have been begotten on her body by the defendant, in December, 1822.

The parties belonged to the city of Boston. The previous accusation and complaint which the statute requires was made before Benjamin Whitman, senior justice of the police court, on the 25th of June, 1823.

It appeared by the complaint, filed in this court, that the child was born in Charlestown, in the county of Middlesex, October 3, 1823. The counsel for the defendant objected that this court had not jurisdiction, the birth of the child being essential to consummate the offence; as in a case of homicide, the trial must take place in the county where the death happens, according to the act of 1795, c. 45.

THACHER, J. No expression in the statute warrants this objection, nor is it according to practice. If allowed to prevail, no court would have jurisdiction, if the child were born at sea; or out of the commonwealth. The objection is therefore overruled.

In her examination before the police court, she had sworn, and she repeated the fact on the stand, that "no other person except the said Schweiring, had had any sexual connection with her for these eight months and more past." On the part of the

Lord v. Schweiring.

defendant, one James McGill testified, that on the last of January, or first of February, 1823, he had sexual connection with her, and on divers times afterwards.

The complainant then offered several witnesses to testify to her former character and conversation, and more especially as to her general character for truth. But to the introduction of this testimony the counsel for the defendant objected as illegal.

THACHER, J. This case partakes both of the civil and criminal character. Though the complaint is instituted by the mother, yet part of the judgment, in case of conviction, is that the defendant shall give security to save the town, to which the child belongs, "free from charge for its maintenance," and the defendant would be committed to prison until he should find sureties for the same. In all cases the credibility of the complainant is left to the jury. She is in the present instance contradicted by one witness in a point which is made material, and her credibility is at stake. I am not certain, that in all cases of this description, it might not be proper to introduce witnesses to satisfy the jury that she was worthy to be believed on her oath in a court of justice. But I have no doubt of the pertinency and propriety of the testimony in this case. The witnesses were then admitted.

Austin, for the defence, dwelt on the circumstance that no offence was more easy to be charged, nor more difficult to be resisted than one like the present; inasmuch as that the complainant herself, though having a direct interest, was made a competent witness.

H. G. Otis, Jr., for the complainant.

THACHER, J., in summing up the case to the jury, observed that the witness was admitted from necessity, to prove a fact which could be known to no one but herself. The law, however, aware of the temptation to perjury, required, that she should have submitted to a previous voluntary examination, and made an accusation on oath before a magis-

Commonwealth v Thompson and another.

trate; that she should in her travail, and before the birth of the child, be put on the discovery of the truth respecting the same, and should accuse the same person of being the father, and have continued constant in such accusation. But though admitted from necessity, she may not be permitted to testify to any fact, which is equally within the knowledge of other persons, who are disinterested. *Drowne v. Stimpson*, (2 Mass. R. 441.)

The jury found the defendant guilty.

DECEMBER TERM, 1823.

COMMONWEALTH v. JOHN THOMPSON AND ANOTHER.

The contents of a letter, written by a prisoner, cannot be testified to by a witness for the prosecution, unless it is shown that the letter is destroyed or in possession of the prisoner.

THE prisoner was indicted under the act of 1804, c. 431, for breaking and entering the warehouse of Homer & Bass, on the 11th of November, 1823, in the night-time, and stealing muskrat skins to the value of \$3000, the property of Messrs. S. Parkman, Jr. & Co. The felony was proved, and the evidence brought it home satisfactorily to the prisoners.

In the course of the trial, it was proved, on the part of the government, that while Silas Holden was in jail, he sent a letter to one Azariah Walker, a material witness, but who had assisted the prisoners to receive and conceal the goods in a barn belonging to his house in Needham. Walker was asked for the letter, but did not produce it, saying that he had mislaid it, and that, after looking for it, he could not find it. The counsel for the commonwealth then inquired of him as to the contents of the letter. The prisoner's counsel objected to the question, on the ground, that it did not appear from the answer of the witness, that the letter was not in existence.

Austin, for the commonwealth.

Knapp and *Moore*, for the defendant.

Commonwealth v. Buckingham.

THACHER, J. decided, that the witness could not be permitted to state the contents of the letter, it not appearing that it had been destroyed, or that it was in the possession of the prisoner, one of which circumstances ought to be shown, before the evidence was admissible of the contents of a written instrument.

JANUARY TERM, 1824.

COMMONWEALTH v. JOSEPH T. BUCKINGHAM.

Where, in an indictment for libel, one count set forth the publication of a libel, "in the following false, scandalous and defamatory words;" the omission, in the recital following, of the word "evening," after the word "Tuesday," which occurred in the original publication, was *held* to be a fatal variance.

Where the editor of a newspaper was indicted for the publication of a libel, and upon the trial a witness was asked, whether the editor, at the time of the publication, was not absent from town, and had no concern in the publication of the number containing the alleged libel; it was *held*, that the question was proper, as going to the intent.

Held also, to be proper to ask a witness, whether, in his opinion, the alleged libellous words referred to the person alleged to be libelled.

On the trial of an indictment for publishing a libel in a newspaper, calculated to bring into ridicule the Russian consul, it was *held* irrelevant to ask a witness, on the ground that the consul, by writing criticisms, &c., for the newspapers, made himself a fair subject for such a satire as the publication complained of,—whether "the Russian consul did not attend at the theatre, some years ago, and assist and direct in getting up a ballet for public exhibition."

Where, on such trial, it appeared that the person alleged to be libelled was described in the publication as "the representative of the emperor of the Russiae," and not as the "Russian consul;" it was *held*, that evidence was admissible, in support of the averments in the indictment, to show that the publication applied to the Russian consul.

Evidence of the truth of the publication, to rebut the charge of malice, is inadmissible, unless a good intent appears upon its face.

JOSEPH T. BUCKINGHAM was indicted for three libels upon Alexis Eustaphie, the Russian consul residing in Boston, the libels being charged in three separate counts. In opening the

Commonwealth v. Buckingham.

cause for the government, the county attorney stated, that although in the indictment it was averred that Mr. Eustaphie was the Russian consul, resident here, and duly accredited, it was only introduced as a description of his person, and that it was not intended to urge, that the publications were libels on his official character.

Jefferson Clark, a witness for the prosecution, was asked, whether he had an interest in publishing the *Galaxy*, his name appearing at the head of the paper as the printer. To this question he demurred. THACHER, J. decided that he was not bound to answer it, if the answer would tend to criminate himself, but that he must answer every question which related to Mr. Buckingham's concern in the publication. He was asked by the counsel for the defendant, if, at the time of the first publication, on September, 1820, the defendant was not absent from town, and had no concern in the publication of that number. To this question the county attorney objected, on the ground that the defendant, having been proved to have been the editor and publisher of the paper generally, was legally answerable for its contents, although he might have had no concern in that particular number. THACHER, J. decided that the question was proper. For if it should appear, that the defendant, on leaving town, had directed his servants to exclude the article complained of, and that it was afterwards inserted by them without authority, and against his orders, that fact would go to the intent, and would be proper for the consideration of the jury.

John S. Ellery, a witness for the government, was asked, "whether, in his opinion, the piece of September 1, 1820, referred to the Russian consul." The defendant's counsel objected to this question, the belief or opinion of the witness not being evidence, and relied on *Vanvechten v. Hopkins*, (5 Johns. 211.) But the court allowed the question to be put, because, although the belief of the witness alone would avail nothing, yet he would be bound to state the facts on which his belief was founded, which would be proper to go to the jury. This

evidence was not to prove an *innuendo*, but the averment that the defendant published the piece of, and concerning the Russian consul.

The county attorney then proceeded to read the publications complained of as libellous. The counsel for the defendant objected to the reading to the jury of the piece in the *Galaxy* of November 7, 1823, which was the second libel complained of, on the ground of a material variance. The word "evening," which is in the original publication, is omitted in the indictment after the word "Tuesday."

THACHER, J. In pronouncing the judgment of the court in the case of *Rex v. Beach*, (Cowper's Rep. 229) on an application for a new trial, in an indictment for perjury in an affidavit, upon the ground of a material variance between the affidavit and the indictment, the letter *s* being left out in the word "understood;" Lord Mansfield says, "we have looked into all the cases on this subject; some of which go to a great degree of nicety indeed. The true distinction seems to be taken in the case of *The Queen v. Drake*, (2 Salk. 660,) which is this, "that where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material. To be sure, a greater strictness is required in criminal prosecutions than in civil cases; and in the former the defendant is allowed to take advantage of nicer exceptions."

Dr. Drake's case, which is thus recognized with so much respect by the court of King's Bench, was an information for a libel, in which it was undertaken to set forth the libel "according to the following tenor," and in setting forth a sentence of the libel, it was recited with the word "nor" instead of "not;" but it is added, that the sense was not altered thereby. The first point decided by the court in this case, was that the word tenor means a transcript or a true copy. In the second place it was held, that this was not a tenor by reason of the variance, for "not" and "nor" are different — different in grammar and different in sense. And Powys, J. held, as to the

Commonwealth v. Buckingham.

point where literal omissions, &c. would be fatal, that where a letter omitted or changed makes another word, it is a fatal variance. Otherwise, where the word continues the same. In the last place, Holt, C. J. said, that in pleading there were two ways of describing a libel, or other writing, by the words, or the sense. 1. By the words, as if you declare of a libel, "the tenor of which is as follows," or "in the words following," you describe it by its particular words, of which each is such a mark, that if you vary, you fail in making good their description. Or, 2. You may describe it by its sense and meaning. Thus it is a good information to show, that the defendant made a writing, and therein said so and so, in which case exactness in words is not so material, because it is described by the perfect substance of it.

I apprehend that the principle of Drake's case is applicable to the present question. What is undertaken to be done in this third count of the indictment? To set forth the libel "in the following false, scandalous and defamatory words," which is in effect to set forth the tenor, or a true copy of them. In this recital, the word "evening" is omitted. It was justly said by the counsel for the defendant, that "Tuesday" includes both day and evening; whereas the writer by using the word "evening" meant to limit himself to that part of the day. The rule of law is strict, and applies to words as well as to sentences. We must adhere to strict rules. This is not unreasonable, where it is easy to be correct; and it is required, that the court may see upon the record the whole matter which is charged as a libel. I am of opinion that the variance is fatal, and therefore the piece cannot be read to the jury.

After this decision, the county attorney, entered a *nolle prosequi* as to the third count.

The ground of defence relied on as to the second count was this. The defendant, as printer and conductor of a newspaper, is a public man. The Russian consul, as soon as he arrived in this country, fourteen years ago, busied himself in the amusements of the country, and wrote critiques on the performances of

the theatre, and on various other matters of taste. He also wrote some pieces in the papers, which were even of a libellous character. He was an author, attempted to write in English, and thereby made himself a public man, and a fit subject for satire and ridicule.

John Parker was called as a witness by the defendant, and was asked "if the Russian consul did not attend at the theatre, some years ago, and assist and direct in getting up a ballet for a public exhibition." To this question, the county attorney objected, on the ground of its irrelevancy. It was argued at length. The defendant relied much on the case of *Sir John Carr v. Hood et al.* (1 Camp. 355.)

THACHER, J. decided that this question was not pertinent to the issue. The government could not be aware of such inquiry, nor ready to meet it. It tends likewise to put the Russian consul on trial for facts, calculated to reflect on him, and to injure him, when he is not on trial, and cannot be presumed to be ready to defend himself. He may deny the fact. He may say he was out of the country at the time this ballet was got up. Now it would be against all principle that he, confiding his interest in the inquiry, should not have notice of the accusation, and be prepared to encounter it. But this is not the time nor place for such inquiry, and the court will not admit it.

The court intimated, that from the course of the defence marked out by the opening counsel, it seemed that it was proposed by the defendant to offer the truth in evidence as a justification of the libellous matter. But both the counsel for the defendant disavowed any such intention. The court then said, suppose that all you say of the Russian consul is true, it does not make him a "public man." He did no more than any citizen might do, and he is not here seeking redress for a wound inflicted on his consular character. The defendant has a right to argue on the whole piece, that it was merely a criticism on an

Commonwealth v. Buckingham.

unfortunate writer, and if the jury consider it no more than legitimate satire and criticism, it will be a good answer to the charge.

Austin, for the commonwealth.

B. Gorham and *S. L. Knapp*, for the defendant.

THACHER, J. charged the jury as follows. The defendant, Mr. Buckingham, is charged with the offence of having composed, printed and published two libels against Alexis Eustaphie, the consul of his Russian majesty, residing in this city, with the malicious intent to defame and vilify him, and to bring him into contempt, hatred and ridicule. The first relates to his conduct as a parent, the second to his life and opinions. The third count has been withdrawn since the commencement of this trial, and must be wholly disregarded by you. In legal contemplation, the two counts are several indictments. The defendant may be convicted on one and acquitted on the other; or you may render a general verdict on both, as you shall finally consider yourselves justified by the law and the evidence. It has not been controverted, that the pieces complained of are set forth in the indictment correctly. You must be satisfied, before you can find a verdict against the defendant, that the pieces which are complained of were published by him, that they relate to the Russian consul, and are libels upon him, and that they were published by the defendant, with the malicious intent to defame the Russian consul, and to bring him into hatred, contempt and ridicule.

On you devolves the duty "to decide at your discretion, by a general verdict, both the fact and the law involved in this issue." But in committing the case to you, it belongs to me to expound to you, with candor and simplicity, the principles of law which are applicable to it, with the view of assisting you in the performance of your duty, and to enable you to come with confidence to a correct result. Trials of this kind are rare, and perhaps from that cause they excite a degree of interest,

which is out of proportion to the offence. But if from any cause you are conscious of any undue interest, or feel any prejudice, you will suffer me to caution you to dismiss them from your bosom, as the enemies of good judgment. Though this case, as most other criminal prosecutions, might have had its origin in the complaint of an individual; yet you are not trying the complaint of an individual, but a presentment of the grand inquest on their oaths, who are bound by law "diligently to inquire and truly to present all crimes and offences committed within the body of this county." This is not therefore a vindictive suit by the Russian consul, to recover damages for wounds inflicted on his character and feelings. So far as these are concerned, the remedy is by a civil process in another court, and whatever may be the event of this prosecution, the personal injury and the civil redress will in no degree be affected.

The questions, what is a libel, and why it is deemed a public wrong, are answered in a clear and satisfactory manner, by our supreme judicial court in the case of the *Commonwealth v. William Clap*, (4 Mass. Rep. 163.) The opinion in that case was pronounced by the late Chief Justice Parsons, who was a most humane judge of criminal law, and always gave to a party on trial the full benefit of his learning and talents, to screen him from an illegal conviction. "A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of the dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule." "The cause why libellous publications are offences against the state, is their direct tendency to a breach of the public peace, by provoking the parties injured, and their friends and families to acts of revenge, which it would not be easy to restrain, were offences of this kind not severely punished." A citizen would be very apt to consider himself justified in revenging himself on one who had maliciously defamed him, and rendered him an object of hatred, contempt or ridicule, if the society to which he belonged, did not punish

the offender. Our law is not defective in this particular, and all pretence for private violence is removed. "A man appealing to the public justice for redress of an injury, must think himself acquitted in his reputation, when he sees that the state resents as an insult to itself a wrong done to his person, property or character." Private revenge for injuries received is a violation of that first principle of society, by which each member agrees to give up a portion of his natural rights, to secure the more perfect enjoyment of the remainder. No man under the protection of the law, is to be the avenger of his own wrongs.

It requires no argument to prove, that a libellous publication is not less likely to produce violations of the peace, because it is founded in truth. And therefore, however it is, that if a man publishes an injurious truth of another, the truth of the publication will be a justification in a civil action for damages; yet such defence will not avail in an indictment for a libel, except in the case, which arises from the genius of our constitution, "of publications respecting candidates for a public office, conferred by the election of the people, and of persons holding a public elective office;" the people having an interest in the publication of truths relating to their public servants. The exception extends also to the case "of complaints to the legislature for the removal of an unworthy officer,"¹ and to some other cases, where the purpose being first proved to be justifiable, that is, done with good motives and for justifiable ends, a defendant might be permitted to give in evidence the truth of the words. I think that this exception secures to the public all necessary intelligence, upon all proper occasions, and would protect printers in publishing facts relating to individuals, in which the community has an interest, in many of those cases, to which the honorable and learned counsel for the defendant alluded in his closing argument, where such publications should not carry on their front the palpable intention to defame.

¹ *Lake v. King*, (1 Saund. 121.)

Considering the interest which seems to be attached to this subject, you will permit me to detain you for a moment longer, on the law of libel, which I consider has been established in this commonwealth on principles of the highest wisdom. The great struggle in England forty years ago, on this subject, arose from the judges having arrogated to themselves the right exclusively to decide in all cases the question, whether a publication complained of were a libel or not, and from their directing the jury to pronounce a general verdict of guilty or not guilty, as they should be satisfied, that the defendant did or did not publish the paper, and as it was or was not truly set forth. The British nation justly considered this, as stripping the subject of his defence of a trial by jury, and the struggle resulted in the act of 32 Geo. III. c. 60, which declared "that on every trial for a libel, the jury sworn to try the issue, might give a general verdict of guilty or not guilty, upon the whole matter put in issue, and should not be required or directed by the court or judge before whom the trial was had, to find the defendant guilty, merely on the proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to the same in the indictment."

During the debates on this bill in the house of lords, the twelve judges, upon a question put to them, declared, "that the truth or falsehood of the written papers are not material to be left to the jury upon the trial of an indictment for a libel; and that it made no difference, whether the epithet 'false' were or were not used in it." The greatest lawyers, statesmen and orators of the English nation took a part in this interesting discussion. But they were content to restore to juries their right of deciding both on the law and the fact, as it undoubtedly existed at the common law. No one contended that, on an indictment for a libel, the truth of the matter should be a defence to the charge; and we do not find in the statute itself, that there is any provision on this point. And yet, gentlemen, the great Lord Erskine, the champion of English liberty, of the

Commonwealth v. Buckingham.

rights of the press, and of the trial by jury, and who has just closed his mortal career, observed, in the house of lords, upon a solemn occasion, so late as the year 1808, "that the law of libel had been brought as near perfection as was perhaps possible; though in earlier life, he did not think that the practice of the courts was right in some points, yet he had lived to see it remedied." (30 State Trials, 1344.)

In this commonwealth the citizens enjoy, in cases of this description, every privilege, which is secured to the subjects in Great Britain, together with the further right, that the truth shall avail as a justifiable defence in certain cases, arising under our peculiar political institutions, to which I have before alluded. The law on this subject was settled, on great consideration, in the case against *William Clap*, by the supreme judicial court, to which an appeal lies in all cases from this court, and which, by its prerogative, corrects the errors of all other judicial tribunals of the commonwealth. The decisions of that court are reported by a public officer, under the authority of the legislature, as the most authentic expositions of the law, for the purpose of diffusing among the citizens, information on subjects of the greatest interest. The solemn decisions of that court are considered as binding on the several judges, at their *nisi prius* terms, and on all inferior tribunals. I freely avow, that I consider them as binding on me generally, upon the principle, that what is determined in that court upon solemn argument, establishes the law, and is a precedent for future cases in that, and in all inferior tribunals. *Eadem lex Romæ, eadem Capuæ.* It is the right of the citizens to be governed by certain laws. Now what certainty would there be in the laws, if a different rule of interpretation on any subject should be adopted in this court from what prevails in the supreme judicial court on the same subject? It would at once take from the minds of the citizens all confidence in the administration of justice here.

The law, as it is laid down by the supreme court in *Clap's* case, is not in violation of the constitution. That instrument

is to be construed so as that its various provisions may harmonize with each other. While it declares, "that the liberty of the press is essential to the security of freedom in a state, and ought not therefore to be restrained in this commonwealth," it guarantees to each citizen "life, liberty, property and character." It declares, "that it is essential to the preservation of these, that there be an impartial interpretation of the laws and administration of justice;" and it lays down, as the first principle of our government, "that all shall be governed by certain laws for the common good." How long would "life, liberty, property and character" be safe, and what would be their value, if the press were not under the restraints of law? The liberty of the press is not confined to publishing truth. It is as large as human liberty is in any other respect. We are free to act, nor has it yet been thought an infringement of civil liberty, that we are answerable for our actions and liable to punishments for violations of the law. So the liberty of the press consists in the being free to publish anything, true or false, without previous restraint, subject only to the control of the law for the abuses of that liberty.

Among the Romans, it was at one period a part of their polity, to appoint a censor of the public manners. Among other high duties of this officer, he had the right to inspect the public and private character of the citizens, and might degrade even a senator from his rank, if he rendered himself an object of public odium or contempt. Modern governments have not seen fit to imitate this institution. In our commonwealth no individual may erect himself into a sort of domestic tribunal, to try and condemn those, who incur his disapprobation, by any singularity of manners, peculiarity of sentiment or character, or even by any defect in morals. Nor may he with impunity presume to hold up his fellow-citizens to public odium, contempt or ridicule.

These principles of law, handed down from antiquity and qualified by our own wise institutions, have, I trust, governed

Commonwealth v. Buckingham.

me in deciding some very important questions, which have arisen in the course of this trial; and it will not be safe for you, gentlemen, to depart from them, when you retire to make up your final opinion, let them operate as they may, either for the government or for the defendant. Hard would be the task of jurors, and uncertain would be the tenure of all our rights, if the decision of cases should depend on the will of jurors, not guided by the known and established rules of law.

From this general survey of the law, you will return with me, gentlemen, to the present case, of which I will endeavor to take a summary view. And first, are you satisfied, from the evidence, that the defendant published the pieces which are complained of as libellous? Although the defendant is charged with having "composed, printed and published," it will be sufficient to authorize your verdict, if you believe the fact of publication merely. To this point you have the testimony of Jefferson Clark, who says, that he has been engaged in the printing establishment of the defendant from the year 1817 to this time, with the exception of a short absence in the year 1822; that the defendant is the publisher and editor of the *New England Galaxy*; that he usually corrects the press; that he, the witness, sometimes, but very rarely, and only in the absence of the defendant, performs that duty. When shown the number of the *Galaxy* of September 1, 1820, which contains the first article complained of, he said that he believed it to be a paper, which was printed in the office of the defendant, because it resembled the newspaper printed by him; but he would not undertake to swear to the identity of the publication. He says, that at and about that time, the defendant was detained at home, and was a good deal absent from the office, being with his family in the country, who were at that time visited with a domestic calamity. But he was in and out of the office, and he left no substitute to correct the proof. Now as the paper was printed in the office of the defendant, by his servants, and for his profit, and as he has never disavowed it, he is in law answerable for the contents.

The paper which contains the alleged libel, was purchased at the defendant's office in September, 1820, by Ezekiel Morse, the servant of the Russian consul, and carried to him and marked at the time. This fact alone is evidence of publication, it being a reasonable and well known principle of law, that if a man sells a libel by his servant, it is considered as evidence of a publication by him, unless he show that the servant acted without or against his authority. Books sold in any shop or warehouse, though not immediately by the master, but by his servant, or one entrusted with the sale of such books, is *prima facie* evidence, and conclusive to all intent and purpose if not contradicted. Lord C. J. Mansfield, in *Trial of John Almon*, (20 State Trials, 842.)

Jefferson Clark likewise testifies, that he believes the number of the New England Galaxy of the date of November 30, 1821, which contains the second alleged libel, was published by the defendant, being similar to the newspaper printed by him at that time. Nothing is shown from which you may infer, that this paper is not a genuine number of the Galaxy which was issued on that day.

Secondly, are these pieces intended to reflect on the Russian consul, and are they libels? As to the second piece, both the counsel for the defendant admit that it was intended to apply to that gentleman, and what is so admitted requires no further proof. The first piece of evidence in relation to the application of the piece of September 1, 1820, is contained in the number of the "Euterpeiad," a paper which was published on the 26th of August preceding. In that is contained an article upon "Miss Eustaphieve," a daughter of the Russian consul, relative to her extraordinary talents as a musical performer, and in reference to which article it would seem, from a postscript, this piece was written. It appears from all the witnesses, that the Russian consul had at that time a daughter in her twelfth year only, who was distinguished as a prodigy of musical talent, particularly for her power of execution on the piano-forte. Mr.

John S. Ellery testified, that on reading that piece at the time, he instantly knew that it referred to the Russian consul and his daughter, and that being his friend, and having taken an interest in his family from their first arrival in this country, about fourteen years ago, he immediately carried the paper to him, and that it appeared deeply to wound his feelings. Mr. Bryant P. Tilden testified, that he immediately knew that the piece alluded to the Russian consul ; that there were no other father and daughter in the city at that time, to whom it could refer ; and that it was a subject of great conversation in the insurance offices here, which you know, gentlemen, are places of great resort, where all news is eagerly detailed, and where an article is perhaps not the less likely to attract attention for possessing something of a domestic character. Mr. Tilden, speaking of the talents of the young lady, says, that the late Dr. George K. Jackson, a most eminent professor of music in this city, would sit by her for hours, hearing her performance in admiration of her powers of execution. Similar testimony was given by Mr. William Coffin. He believed that the piece could refer to no one but the Russian consul, from his avowed fondness for music, and from the distinguished talents of his daughter, which was a subject of much conversation at that time among musicians and amateurs.

It was attempted, in the defence, to show, that the publication referred to a Mr. Lewis, who, with his children, two boys and a little girl, were in this city a few years since. Some witnesses have testified, that this gentleman had the reputation of treating his children with severity, and that it was owing to this, that the boys had attained to considerable excellence on the piano-forte. If this were true, gentlemen, it would be nothing surprising, as we know, that it is almost impossible to secure the attention of children, and that they should attain to great accuracy in any literary or scientific pursuit without perpetual watchfulness, and the occasional application of severity. I have known some rare exceptions to this rule, but the celebrated

Dr. Johnson acknowledged, that he was indebted for his accuracy in the languages to the severity of his masters. Mr. John Dodd, who was examined as a witness for the defendant, testified that the daughter of Mr. Lewis never appeared in public ; that the performances of the boys were remarkable for children ; but that they were not equal to Christiani's, or what would be deemed rare or excellent in a professor. He further testified that Mr. Lewis, with his family, left Boston sometime in the year 1820, and that on reading the piece he did not think it could refer to him and his children. Messrs. Ellery, Tilden and Dodd all agree in the fact, that the Russian consul is a tender father and passionately fond of his daughter, as well as proud of her accomplishments. And hence the eloquent counsel for the defendant raise an argument, that this piece could not be intended to refer to him. But, gentlemen, if from the evidence, you believe that the piece was intended to refer to him and his daughter, then this fact will tend to show the disposition of its author, and you may fairly infer, that he meant to wound Mr. Eustaphie in the most susceptible point. For if he is an indulgent father, it must wound him the more deeply, to be accused of the want of natural affection. But it belongs to you to weigh all the evidence, and if you are not satisfied, that the piece was meant to reflect on that gentleman, the defendant will be entitled to an acquittal.

Are the pieces complained of libels? The first is averred to relate to the conduct of the Russian consul as a parent towards his daughter. It says, in substance, that the musical superiority of this young lady was effected by the incessant drilling of a cruel and heartless master ; — that her astonishing rapidity of fingering produced no effect on the feelings, except pity for the haggard cheeks and feeble frame of the lifeless automaton ; that the parent had subjected his daughter to daily drudgery by threats, promises and flattery, without alleviating her task by a ray of kindness or affection, and that all the future prospects of the child were sacrificed at the altar of ambition. He con-

cludes with invoking the indignation and contempt of an enlightened community upon the tyrant. This paper is in legal contemplation a libel, because it exhibits the party intended as a heartless monster, devoid of natural affection, and sacrificing his daughter to gratify a senseless ambition ; thus containing that sort of imputation, which is calculated to vilify and bring a man into hatred and contempt. Now if you believe, that the defendant meant in this way to hold up the Russian consul to the view of the public, with the malicious intent to bring upon him the hatred of the community, you will be warranted in pronouncing a verdict of guilty.

You are to judge of the motive, for there is no criminality without intention. Now where a party has published a paper of this character of another, he is answerable for its legal effect ; "a criminal intent from doing a thing in itself criminal, without a lawful excuse, being an inference of law," unless he can negative the malicious motive. You will therefore next inquire, whether the defendant has succeeded in this part of his defence. And here you will recollect and weigh the argument of the eloquent counsel for the defendant on this point. They have read the whole piece from which the libellous matter was extracted, and they deny that it refers to any individual. They say that according to all the rules of fair criticism, it must be interpreted to relate to a school of musicians and performers, and not to the Russian consul ; and that it is plain, that the object of the writer was to instruct, with a view to correct and improve the public taste.

Was the general object of the writer innocent and laudable ? If perceiving that undue praise had been bestowed on what he deemed an improper object ; and that it was likely to introduce a bad taste into the divine art of music ; or that a sentiment prevailed, which was calculated to injure the general education of young ladies, by taking off their attention from the useful branches of knowledge, and fixing them on the ornamental only, thus sacrificing mind to accomplishment ; if you are

satisfied, that the general design of the writer was to discuss merely these subjects of general interest, thus you may fairly infer that his object was innocent and laudable. But if in prosecuting this his lawful object, he has maliciously strayed from it, and indulged himself in defaming the Russian consul as a parent, then the general design of the piece will not excuse the wanton attack on the feelings and character of that gentleman.

As to the second piece complained of, I agree with the counsel for the defendant, that it is "a rude, uncouth and indecorous piece, of which I should prefer to be the subject rather than the author." We look in vain to find in it any classical wit, to disguise the feelings of the author towards the individual whom he meant to satirize. The whole piece has been read to you by the defendant's counsel, and you are to weigh the argument which they have made, and in which they insist that it is merely harmless wit, devoid of any malevolent design. I think, in passing judgment on it, you may fairly consider, whether you would feel wounded at finding yourselves elevated into the columns of a newspaper, to be gazed at by the passengers, and designated in the style, in which it seemed good to the ingenious author of this piece, to display the life and opinions of Mr. Eustaphieve. You are not to resort to strained rules of criticism, or to seek for the meaning of vulgar epithets, as was done with great ingenuity and effect by one of the defendant's counsel, in the almost to us unknown science of heraldry. But you are to exercise your own common sense, not imagining that, because you are in a court of justice, you are to see with other eyes, or hear with other ears, or to judge with other judgment, than if you were by your own fire-side.

In this piece, the author seems to delight in the figure of a Bear, and to attach that appellation to Mr. Eustaphieve. He speaks of "the sign of the Bear and Fiddle" — he speaks of the Russian consul "as sucking a Bear," like Romulus and Remus. He speaks of "the dancing Bear" — "the polar Bear" — "the rugged Russian Bear," and "of a set-to be-

tween a big Bear and a Dandy." He also alludes to his employments, as being fond of music, of fishing, of writing in the newspapers, — and there are some expressions of double meaning, which, if taken in their vulgar signification, are highly offensive. Now, gentlemen, weigh this in the judgment of common sense and common charity. If, on a deliberate view of it, you believe it was designed as a piece of criticism on an unfortunate author, as mere and legitimate satire with a view to correct the public taste, and to prevent the writer from indulging his vein for scribbling, it was harmless. But if, on the contrary, you believe, that it was meant to represent the Russian consul as an object of contempt and ridicule, to wound his feelings, and to sport with him in a land of strangers, — then the laws of hospitality have been violated, as well as the laws of the land. For, "if any man deliberately and maliciously publishes anything in writing concerning another, which renders him ridiculous, or tends to hinder mankind from associating, or having intercourse with him," it is a libel.

Verdict, guilty on the second count, and not guilty on the first.

Before sentence, the counsel for Mr. Buckingham addressed the court on the nature and extent of the punishment such an offence ought to receive ; they contended that it did not fall within the several classes of libels, which it had been found necessary to punish with severity, namely, that it was not against government, and of a seditious nature ; nor against a magistrate, or one high in office, whereby the public as well as the individual might be injured ; nor one by which the peace and happiness of the domestic circle was disturbed ; but only satire, carried a little beyond prescribed rules. They also contended, that as the alleged libel was drawn from an old publication, and as time went to the merits of a libel, it certainly ought to go in mitigation of punishment. Much reliance was placed on the decision of the king's bench, on the application of Sir Hudson Lowe for an information to be granted against Mr. O'Meara,

Commonwealth v. Woodbury and another.

the author of the account of Napoleon Bonaparte's exile at St. Helena ; which was refused because he had allowed a fifth edition of the work to appear, and more than six months to elapse before he commenced his complaint.

THACHER, J. said that there was a great difference between an application to the king's bench for an information in such a case, and an indictment found by a grand jury. That court could not, very properly, exercise their extraordinary jurisdiction under such circumstances, but would leave the party to the ordinary redress.

The defendant was sentenced to pay a fine of one hundred dollars, and to give sureties for his good behavior for one year, himself in five hundred dollars, and two sureties each in two hundred and fifty dollars. From this judgment he appealed to the supreme judicial court. (See *Commonwealth v. Buckingham*, post.)¹

JANUARY TERM, 1824.

COMMONWEALTH v. JOHN WOODBURY AND ANOTHER.

On the trial of two persons for having in their possession, with intent to utter, counterfeit bills, proof that one of them had in his possession, at another time and place, a counterfeit bill not mentioned in the indictment, is admissible, to show his guilty knowledge that the bills were counterfeit.

It is no justification, on such trial, that the bills were passed at a gaming table.

The Bank of the United States was licensed and authorized as a bank in this commonwealth, within the meaning of the statute of 1804, c. 120.

Under the statute of 1804, c. 120, it should be averred in the indictment, that the defendants intended to injure and defraud, that being, by the statute, a substantive part of the offence. [Rev. St. c. 127.]

¹ At the trial of the appeal before Wilde, J. he allowed the defendant to prove, that Mr. Eustaphie assisted in getting up a ballet at the theatre. He confirmed the law generally as laid down in the municipal court. But the jury did not agree in finding a verdict, and the indictment was taken from them

Commonwealth v. Woodbury and another.

The prisoners were tried and convicted upon the act of 1804, c. 120, s. 4, for having in their possession four counterfeit bank bills, in the similitude of the genuine bank bills of the United States Bank, payable at their banking house in Philadelphia, knowing that they were counterfeit, and with the fraudulent intent to pass them as true. In the second count, they were charged with having tendered two of these bills in payment to Timothy Russell. A motion for a new trial was made by their counsel, which was submitted to the court without argument.

THACHER, J. Wherever learned counsel entertain a doubt of the validity of proceedings, I am glad to have the questions brought before the court for deliberate revision. As in fact most cases are here finally disposed of, I should be sorry, if through defect of faithfulness in counsel, or of caution in the court, injustice should be done.

The first cause assigned in the motion for a new trial is, that it was permitted to be shown in evidence at the trial, that Hall had in his possession, at another time and place, a certain other counterfeit bill, which is not mentioned in the indictment. It was permitted to be shown at the trial, that Hall had in his possession and actually passed, a day or two after he had tendered the bills mentioned in the indictment, a certain other counterfeit bank bill. Now it was material for the government to prove that the prisoners had, at the time, the guilty knowledge that the bills were counterfeit. To this purpose it is usual and proper to show the conduct of the prisoner at the time, and if it should appear, that other forged notes were in his possession, or that he had passed other counterfeit bills, at and near the same time, all these facts, with all other circumstances, are to be considered by the jury, who will decide whether the defendant had knowledge of the forgery, and was a fraudulent dealer in the article. This principle of evidence was deliberately settled at the Old Bailey, before Lord Ellenborough and the other judges of the K. B. in 1804, in the case of the *King v. Wylie*, (1 New Rep. 92.)

Commonwealth v. Woodbury and another.

The second cause assigned for a trial is, "that the bills were passed at a gambling table." The fact proved was, that while Timothy Rupell and the prisoners were playing cards at a gaming table, Rupell changed for them the bills mentioned in the indictment, giving to them good bills in exchange. It is no less a crime for a person to have a forged bill in possession at a gaming table with intent to pass it as true, than at any other place. The question is not on the validity of a gaming contract, but whether a man may, at any time, at any place, or under any circumstances, have counterfeit bills in his possession, knowingly, and with intent to pass them as true. I know of no privilege which a gaming table confers, to protect a dealer in forged paper from the consequences of his fraudulent purposes.

The third reason assigned in the motion is, that the prisoner, being charged with uttering and tendering in payment two counterfeit bills, purporting to be signed in behalf of the president, directors and company of the Bank of the United States, "the same being a corporation by law licensed and authorized as a bank within this commonwealth," were yet convicted, although the bills purported to have been issued by a corporation at Philadelphia, in the state of Pennsylvania, and payable there.

The second count of the indictment is founded on the 2d and 3d sections of the act of 1804, c. 120, by which, if any person shall utter or tender in payment as true, any bank bill, signed in behalf of any company or corporation by law licensed and authorized as a bank within this commonwealth, with the intent to injure or defraud any body politic or corporate, or any person or persons, he shall, on conviction, be punished as is therein directed. The Bank of the United States, mentioned in the indictment, was established by a law of congress, and must be considered as established in all the states, and consequently licensed and authorized by law as a bank within this commonwealth. But this count of the indictment is defective in not averring whom the defendants intended to injure and defraud, that being, by the statute, a substantive part of the offence. No

Commonwealth v. Woodbury and another.

judgment can be rendered on this count of the indictment, by reason of this defect, and the judgment thereon must be arrested.¹ The first count of the indictment is founded on the 4th section of the same act, which declares that if any person shall have in his possession, within this state, any counterfeit bill, in the similitude of the bills or notes payable to the bearer thereof, issued by or for any banking company, which is or shall be established within this state, or in any other part of the United States, for the purpose of rendering the same current as true, or with the intent to pass the same, knowing the same to be counterfeit, every such person shall suffer the penalty which is therein provided. The description of the offence in this count is in the words of this law, except that it is averred, "that the bank is a banking company only, established by law within the United States."

The Bank of the United States being, as I have before stated, established in this commonwealth and in all the other states of the Union, I have no doubt that the offence is legally described in the first count, and that it is my duty to render a judgment thereon, and to overrule the motion for a new trial.

¹ Where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved; though it is sufficient to allege it in the prefatory part of the indictment. But when the act is in itself unlawful, the law infers an evil intent, and the allegation is matter of form, and need not be proved. *King v. Phillips*, (6 East, 464.)

MARCH TERM, 1824.

COMMONWEALTH v. JOSEPH T. BUCKINGHAM.

Where, on the trial of an indictment for a newspaper libel upon the Russian consul, the libellous piece described the person as "the representative of the emperor of the Russias," without naming the Russian consul, or stating that such representative resided in Boston; it was *held*, that evidence to prove the averment in the indictment, that the consul was the person referred to, was admissible.

On the trial of an indictment for a libel, which represented a person as having conducted disgracefully at a ball, it was *held*, that evidence of the circumstances which occurred at the ball, to rebut the allegation of malice in the indictment, was inadmissible.

THE defendant was indicted for a libel on Alexis Eustaphie, found at the February term of this court. It was a new indictment on the piece, which was contained in the third count of the indictment, which was tried at the January term. (*Ante*, p. 29.) Owing to a defect in the recital, that count failed at that time, and the county attorney entered a *nolle prosequi* at the trial and before the verdict was rendered. No exception was taken on account of the former indictment. It was admitted, that the defendant was the editor and publisher of the New England Galaxy, in which the piece was published November 7, 1823. The county attorney read the piece, and there proposed to leave the case, without examining any witnesses. Some conversation then took place between the counsel on the question, whether the government had offered sufficient evidence to prove, that the libel related to the Russian consul. The county attorney thought that the piece itself contained sufficient to prove that fact. The counsel for the defendant said that the Russian consul was not named in the piece, that he was not in that capacity the representative of the emperor of the Russias, being the terms used in the piece, and that it did in fact more

Commonwealth v. Buckingham.

properly apply to the Russian ambassador, Baron Tieul, at Washington, than to him, and that it was not competent to go into any evidence to prove that the piece related to Mr. Eustaphieve. The judge decided that the government might prove their averments, and that, as they had averred that Mr. Eustaphieve was the Russian consul residing in Boston, duly accredited by the government of the United States, and that he was present at an exhibition ball, given by Messrs. Parks and Labassè, at Concert Hall, it was undoubtedly competent and material for the government to prove those facts, if they choose so to do.

John S. Ellery, called as a witness, said, that he was present at the ball, that the Russian consul was likewise there, that no other person having an official character under the Russian government was present, and that Mr. Eustaphieve had acted in the office of Russian consul for fourteen years, residing, during that time, in Boston. The judge then asked if it was admitted, that he was duly accredited as a consul, as that was alleged in the indictment. And thereupon the *exequatur* of Mr. Eustaphieve, dated September 7, 1809, signed by President Madison, was read. The witness further stated that there was a disturbance during the ball, that Mr. Labassè being ignorant of the English language, requested Mr. Eustaphieve to interpret for him, on which account Mr. Eustaphieve interested himself, at the time, in his behalf, and that he was no otherwise concerned in the affair, than as the friend and interpreter of Mr. Labassè, who felt himself injured at the time. Other facts in the testimony of this witness will appear in the charge to the jury.

James T. Austin, for the commonwealth.

Benjamin Gorham and *Samuel L. Knapp*, for the defendant.

S. L. Knapp, in opening for the defence, insisted that the piece was a mere harmless account of a public ball, and of the occurrences of the evening, and that in consequence

of a disturbance which occurred there, the defendant published in his paper the piece complained of, without malice, and with such observations only as the circumstances merited; and then offered to prove the circumstances, in order to rebut the pretence of malice. This was objected to by the county attorney, and the admissibility of the evidence was argued at much length by him and by Mr. Gorham. Mr. Gorham disavowed the intention of proving these facts as a justification of the libel, but offered them only to rebut the charge of malice, and he insisted that for the court to reject the evidence was to usurp the prerogative of the jury, and to decide upon the effect of evidence. He argued that if the evidence was rejected, it would follow that to publish that a person had been convicted of a crime, as murder or burglary for instance, would be a libel, even if it were true; for the party would not, on a trial, be permitted to show the truth of the fact.

THACHER, J. I do not consider that in deciding this, I shall interfere with the prerogative of the jury. It is the undoubted right of the court to decide on what is evidence, and it belongs to the jury to judge of the effect of evidence after it has been admitted. The defendant undertakes to justify the publication, on the ground that the subject-matter was of a public nature, which was rightfully communicated to the public, and that it called for such remarks as are contained in the piece. Or rather, he offers to prove that the publication was for a justifiable purpose and not malicious, nor with intent to defame, by showing the circumstances which occurred at the time. The public may have an interest in a publication on account of the individual concerned, or on account of the subject-matter. The individual may be a public officer, or a candidate for a public office, and the piece may relate to the public service. It may relate to one who has been convicted in the due course of public justice of an infamous crime, or to one charged with an infamous crime, as murder, burglary, or swindling, and who may have fled from justice. The public may, in such case, be

Commonwealth v. Buckingham.

properly called on by advertisement or otherwise, to assist in arresting the fugitive and in bringing him to justice. And where such good intent appears on the face of a publication, evidence of the truth of the fact is admissible to rebut the charge of malice.

The decision of this motion must, I think, depend on the question, whether the public appears to have such an interest in this case as to warrant the inquiry. The subject of the piece is "an unpleasant and disgraceful disturbance," as it is called, which occurred at an exhibition ball, given at Concert Hall, in this city. If it was of a public nature, and the community had an interest in it, it was because of the occasion, or of the place. The occasion was a voluntary assemblage of persons for the amusement of dancing — the place was a licensed inn. Now, what interest have the public in the details of this scene? If any crime was committed there, it may be investigated like other crimes, committed in any other place. Suppose that an individual had intruded himself improperly into the company, or had forfeited his right to continue there by any improper conduct. The managers, after requesting him to retire, and his refusal, might have turned him out by force, leaving it to him, if he confessed himself injured, to bring his action for redress. If there was any disorder, which was not the subject of legal redress or inquiry; if any one, for example, acted unbecoming his character as a gentleman, or of his rank and standing in society; let such an individual suffer the natural consequence of his conduct in the silent loss of reputation; but I do not know, that the public has such an interest in it, as that it called for, or would justify, a libellous piece in a newspaper. Suppose that we should now institute an inquiry into all the circumstances which occurred at this ball. Some manifest inconveniences would arise. There were present between two and three hundred persons, ladies, gentlemen and children. We cannot limit our inquiry to what was said or done by Mr. Eustaphieve. It will be equally proper and necessary to inquire what was said or

done by each individual who was present. Because the scene consists of all that was said and of all that was done by each individual who was present. It is said in the piece, that there was a disgraceful disturbance, the history of which would not do honor to the parties concerned. Who is to be censured, and who is to be approved, is wholly uncertain. But this we know, that the conduct of two hundred individuals, who are not on trial, who are not present, who have no notice of the question, and whose reputation may be affected, would in this way be made a subject of solemn investigation in a court of justice. I am of opinion, that such inquiry would be unprecedented, and that it would shock the good sense even of persons not learned in the law ; much more would it offend the legal discernment of all who are acquainted with its humane and wise principles.

“ I take it to be clear law, says Bayley, J. in the trial of Sir Francis Burdett, (4 Barn. & Ald. 324,) that if a libel contain matters imputing to another a crime capable of being proved,” (and I think the rule equally extends to a libel, imputing to another disgraceful conduct in his office or as a private person,) “ you are not at liberty at the time of the trial, to give evidence of the truth of those imputations. And this is founded on a wise, wholesome and merciful rule of law ; for if a party has committed such an offence, he ought to be brought to trial fairly and without any prejudice previously raised in the minds of the public and the jury. The proper course, therefore, is to institute direct proceedings against him, and not to try the truth of his guilt or innocence behind his back, in a collateral issue to which he is no party.” The indictment against Sir Francis Burdett was for a seditious libel, in which he was charged with attempting to excite discontent among the subjects and soldiers of the king, and to excite them to hatred of the government. In the libel he represented that divers subjects of the king, men and women, had been inhumanly cut down by the dragoons at Manchester. At the trial, the defendant offered to prove the conduct of the troops at the time alluded to, or in other words,

Commonwealth v. Buckingham.

to prove the truth of the allegation. But the evidence was refused, and the judges of the King's Bench, although they differed on other points of law decided at the trial, unanimously approved the rejection of this evidence. And even after the conviction of that defendant, when brought up to receive judgment, affidavits offered in mitigation of the sentence, containing proof of the truth of the facts charged in the piece, were refused by the whole court, because they said, if affidavits are admitted on one side, they must admit them on the other, and so they would incidentally try individuals for a crime who were not on trial. The principle of this decision applies to this question. If we should go into this inquiry, we should, in reality, be trying individuals for disgraceful conduct, affecting their character at least, where those individuals are not on trial. And as nothing is more clear to my mind, than that the character of an individual may not be attacked, except in a court of justice when he has had due notice of the charge, and a fair opportunity to defend himself, I cannot admit the evidence which is now offered by the defendant.

Mr. Gorham then made the closing argument for the defence, and Mr. Austin for the government.

THACHER, J. then addressed the jury substantially, as follows :

This is a charge against the defendant, for publishing a malicious libel on the character and conduct of Alexis Eustaphieve, the consul of his Russian majesty, duly accredited and residing in this city. The intent alleged is, that it was with the design to injure and vilify him, as well in his office as in his general good name and estimation, and to have it believed that he had, upon a certain occasion, conducted himself in a disgraceful manner. The indictment contains a second count, in which the same piece is charged to have been published by the defendant, with the design that it should be believed that the Russian consul had conducted, upon a certain occasion, in a manner unworthy of his said official station of consul, by engaging in brawls and quarrels with persons of low character, and that it

should be believed, that he was unworthy to hold and sustain that office and station. You are constituted, in this case, the judges both of the law and the fact. If the piece complained of should not in your estimation be a libel,—if the defendant did not publish it, or if it does not relate to the Russian consul; the defendant must be acquitted. And although you should be satisfied of these several facts, yet, as the essence of the crime consists in a malicious motive, if you should find that the act of the defendant was free from such motive, he must be acquitted. But it is not necessary that you should be satisfied, that the piece was published with all the evil motives which are alleged in the indictment. If you believe that the libel was designed to vilify the Russian consul as an individual only, and to bring him into contempt and hatred, you will be authorized to find a verdict against the defendant on the first count only. But if you should believe, that it was published with the malicious design to injure the Russian consul in his office also, and to cause it to be believed that he was unworthy to retain it; then it will be your duty to find a general verdict. In this, as in all other criminal accusations, the burden is on the government to prove the defendant's guilt. If, after a full review of the case, that should remain doubtful in your minds, then that doubt is to operate in favor of the defendant's innocence, and he will be entitled to your verdict in his favor. Though accused of a crime, his conduct is to be weighed in the judgment of charity, by that golden rule, which we should wish and expect, in like case, should be applied to our own conduct.

As to the fact of publication, that is conceded by the defendant. Was it intended to apply to the Russian consul? In addition to what appears in the piece itself, you have the testimony of Mr. Ellery, who says, that in an interview with the defendant in January last, he admitted that it was intended to apply to the conduct of the Russian consul, upon the occasion which is referred to in the piece.

In considering whether the piece is a libel, you will read it

Commonwealth v. Buckingham.

with attention, and apply to it the plain, unbiased judgment of your understanding. "The technical definition of the crime of libel is, that it is an excitement to a breach of the peace, by means of a written instrument, containing matter injurious to the fame and character of another." Is this piece injurious to the fame and character of the Russian consul? It begins with paying a compliment to the performances of the pupils, and to the skill and fidelity of their instructors. It proceeds to speak of a communication which the editor had received, giving the "details of an unpleasant and disgraceful disturbance, which occurred in the course of the evening, the history of which would not do honor to the parties concerned." So that the writer was aware, that he was upon a subject of delicacy affecting the characters of other persons. Mr. Eustaphieve is then introduced under the description of "the rugged Russian bear," as being a conspicuous actor in the scene, "in consequence of his attempting to jump with his cocked hat and all, down the throat of one of his opponents." He then says, that it was best, at that time, not to express an opinion on the subject, but to leave it to him, "who while he is the representative of the great autocrat of all the Russias, &c., does not deem it a derogation from the dignity of his high vocation, to become a party in the quarrels of dancing-masters and fiddlers." Thus bringing the details of this scene into direct connection with the office which he held, and leaving it to be inferred, that though he was the representative of the Emperor Alexander, he was yet a party in the quarrels of dancing-masters and fiddlers.

Now it is for you to judge, whether this piece has the tendency, which the indictment alleges, to degrade the Russian consul in public estimation as a man, and to affect his standing in his office. Consuls are persons appointed by the sovereign of a state, to reside in foreign ports, for the purpose of taking care of the commercial interests of his subjects transacting business there. They are usually persons of known probity and commercial intelligence, and are expected to understand

not only the laws and rights of their own country, but the laws and customs of the place where they are appointed to reside. It is their duty to aid and protect their fellow subjects, and to advise and assist them in all cases wherein their rights or interests may be concerned. The affairs of trade, and the interests, rights and privileges of merchants and seamen in foreign countries, are ordinarily left to their conduct. It is expected of them, that they correspond with the ambassador from their respective sovereigns to the government of the country, within whose dominions they are stationed, and that they should send to him information of any transactions, which may affect the political or commercial interests of their country. And in case there is no ambassador or other public minister from their sovereign residing in the country, they are to transmit their letters directly home to the government which appoints them. Though a consul be not a public minister, under the protection of the law of nations, he yet enjoys some important privileges annexed to his office, which distinguish him from the private inhabitants of the place where he resides. So that you perceive, that from their situation, consuls are officers of honor and trust, and that it is in their power to do great good or harm, and even to affect the relations of friendly countries; and hence arises the importance, that consuls should be honorable men, and that they should support the dignity of their station by their grave and prudent deportment. You are to consider, whether representing an individual, who holds an office of this kind, as guilty of disgraceful conduct, and engaging in the quarrels of dancing-masters and fiddlers, is not injurious to his fame and character. In common with all other citizens, Mr. Eustaphie is entitled to be protected from unlawful attempts to render him an object of odium or contempt. And in rendering him an object of odium and contempt as a man, you will consider, whether his official character will not be sacrificed. It is not to be supposed, that his government will retain an officer in a station of confidence and responsibility, if he maintains not a

Commonwealth v. Buckingham.

character becoming that station. So that it is not foreign to your duty to inquire, whether the piece complained of has that tendency, and if it has, whether it will not also tend to provoke him and his friends to acts of revenge, and so to a breach of the peace, which is the definition of the offence.

And here, you will recollect the construction which the counsel for the defendant have put on this piece. They say, with truth, it contains no charge of official misconduct, nor any imputation on the moral character of the Russian consul. They also say it is harmless, sportive wit, which a wise man would disregard, and that no good comes from prosecutions of this description. And they call upon you to give to the words the most favorable sense; and it is undoubtedly your duty to do so, but you are not to violate your understanding by giving to the words any signification which is not consistent with sound sense and the common meaning of the language. You will next inquire if the intent of the defendant in publishing this piece was malicious, and if you find that it was done deliberately and wilfully, and that he persisted in it improperly, this will be evidence of malice. To this point, the testimony of Mr. Ellery is material. He says, that as a friend of the Russian consul, he called on the defendant, in January last, and informed him that the publication had greatly wounded the feelings of that gentleman, and that he was apprehensive it would injure him with his government. To this the defendant replied, that he bore no ill will to the Russian consul, that he had no knowledge of the circumstances, that he had written and inserted the piece on account of a communication which he received on the subject, that he had no acquaintance with Mr. Eustaphie. Mr. Ellery then proposed to him to publish an apology, that the redress might be as public as the injury. He showed to the defendant a piece which he had written for this purpose. But the defendant declined publishing this, and then wrote a piece which he was willing to publish. It purported, that as many persons had asserted that the conduct of the Russian

consul at the ball was improper, and others equally respectable insisted that it was correct, it was not for him, the defendant to decide the matter. This piece was not satisfactory to the Russian consul. Now the counsel for the defendant says, that his conduct in this particular was very proper, for if he had published a disavowal of the slander under such circumstances, he would have deservedly forfeited the confidence and patronage of many of his friends and patrons. I exceedingly regret that this negotiation was not successful, and I think it is much to be lamented, that when the defendant wrote this piece, his prudence did not suggest to him, that, possibly, he was about to inflict a severe wound in the breast of a man, who, he says, never injured him, and against whom he declares, that neither at that time, nor at any other, had he entertained any malice.

With the scene at Concert Hall, and with the conduct of those who were engaged in it, you have no concern at this time. If a riot was committed there, let those who were engaged in it be prosecuted according to law. If the Russian consul committed any offence against the laws, or against good manners, he is as liable to legal animadversion as any citizen. His official character does not protect him. But let it not be understood, that the printer of a newspaper may publish a piece, calculated to bring this gentleman into contempt with us or with his own government, and thus to destroy him, without trial and without a hearing. We do not hold our characters at the mercy of the printers of any newspaper. By our laws, a citizen may not be charged with any disgraceful or flagitious conduct, affecting his good name, his standing in society, or his employment, except before the judicial tribunals of the country, where he may be heard in his defence, and be tried according to the established rules of law. That the law of libel is ancient, and dates from a period beyond that of newspapers, is no reason, in my opinion, for relaxing its principles. The printer of a newspaper has power in proportion to his talents, to the interest which he excites, and to the diffusion of his publication. Who is the

Commonwealth v. Buckingham.

perfect man that may not, in the hands of the eloquent and ingenious satirist, be placed in an uncomfortable situation? What is so venerable or sacred, as not to have been subjected to the shafts of ridicule? And if, whenever we open a newspaper, we are to expect to find some extravagant representation of ourselves or of our neighbors, something caricatured either of praise or of blame, who that is conscious of the defects which are incident to the human character, would wish to live in such a society?

While all protection and encouragement are to be given to the directors of the press, in diffusing intelligence, in imparting instruction, and in the free, manly discussion of all truths affecting religion, morals, government, and whatever concerns human happiness; there is a limit beyond which, if they pass, it must be known, that they violate the law. Whether this is one of those cases, is left to your judgment to decide.

The jury, after a conference of two hours, returned into court and found the defendant guilty on the first count, and not guilty on the second. He was then sentenced to suffer imprisonment in the common jail for thirty days, and to pay the costs of prosecution. From this judgment he entered an appeal.¹

¹ This appeal was tried before Wilde, J. at the supreme judicial court, November term, 1824. The law, as laid down in this case, was fully recognized and confirmed by him in his address to the jury. The defendant was found guilty and sentenced, no question being reserved for the whole court.

APRIL TERM, 1824.

COMMONWEALTH v. GIDEON WOODWARD AND ANOTHER, AS
PRINCIPALS, AND WILLIAM STICKNEY, AS ACCESSARY.

An accessary cannot be put upon trial, unless by his own consent, until the conviction of the principal.

Where one of two principals, charged with the commission of a felony, was put upon trial and acquitted, and the other principal was not found, a motion for the discharge of an accessary was denied.

In the first count, the principals were indicted on the act of 1804, c. 143, s. 4, for breaking and entering the store of James Vannever and John Sargent, in the night time, and stealing one quintal of dry fish, and that William Stickney, before committing the felony, did counsel and procure the same to be committed, and he was an accessary before the fact. The second count charges against the principals the same offence, and Stickney with receiving the fish, knowing that it had been stolen. The third charges the principals with a simple larceny, and Stickney as a felonious receiver.

This indictment was continued from the last term. Jackson had not been found. The counsel for Stickney objected to his being tried, until the conviction of the principals.

THACHER, J. In indictments against accomplices, no verdict can pass against the accessary, till the felony charged on the principal has been established by a legal conviction, unless the accessary will waive the benefit of the law, and submit to a trial. So Foster says, that from the connection between the guilt of the principal and the accessary, the latter "shall not, without his own consent, be brought to trial, till the guilt of the principal is legally ascertained by the conviction or outlawry of him, unless they are tried together; and that in this case, the jury shall be charged to inquire first of the principal; and if

Commonwealth v. Woodward and another.

they are satisfied of his guilt, then of the accessory ; but that if the principal be not guilty, both must be acquitted.”¹ As the accessory in this case insists on a separate trial, although possibly both might be tried together, yet as they might experience some injury from that course, the trial of the principals shall proceed alone. *Commonwealth v. Phillips*, (16 Mass. R. 423.)

Gideon Woodward was then put on trial. Both he and George Jackson were apprentices to Messrs. Vannever and Sargent, who were coopers, and who were in the practice of receiving fish from vessels into their store, on Swett's Wharf, in this city, on storage. But they testified that they did not consider themselves as owners, or accountable for any fish, until it had been weighed and received into their store. They could not declare, with confidence, that the quintal of fish, which they had found in Stickney's store, belonged to them ; it resembled such as was in their own store, being streights culled, so called. They had not missed the article, but it had been voluntarily returned to them by Stickney, who said, at the time, that he had paid two dollars for it to the prisoner and his companion, Jackson.

The prisoner had been examined at the police court as a witness against Stickney, and all his confessions, while giving his testimony, and likewise his voluntary statements to Mr. Vannever, were used in evidence against him by the government. He had uniformly declared that part of these fish were droppings from the barrows, which were used in conveying the fish from the vessel to Vannever and Sargent's store, and that the rest had been given by the master of the vessel to Jackson, his fellow apprentice ; that they had never been weighed or deposited in the store ; and that as they were picked up, they were thrown behind some casks, and at evening had been removed to Stickney's store. He always declared, that he had been informed by Jackson, and believed, that the fish which dropped

¹ Foster's Crown Law, 361.

Commonwealth v. Woodward and another.

from the barrows were a perquisite of the apprentices, and that he took them under this impression. Mr. Vannever testified that when the prisoner came into his service, something was said about perquisites, and he gave him a very good character for honesty and general conduct. Other witnesses testified likewise to a loose practice among apprentices as to droppings and broken fish.

Austin, for the commonwealth.

Richard Fletcher, for the prisoner.

THACHER, J. charged the jury as follows. This case is important both to the prisoner and to the government; for if the charge is true, the prisoner has added to his fraud, a violation of the trust, which was reposed in him by his master. You are to be satisfied, in the first place, that the property had legally vested in Vannever and Sargent. If the evidence fails to satisfy you in this respect, the accusation has not been supported, and the prisoner must be acquitted, because the judgment would not be a bar to another indictment for stealing from the true owner. The great question in the case is, whether the property was taken feloniously; for if the prisoner acted under a mistake of right, without a fraudulent intention at the time, it is not a felony. And on this point, there is no evidence, but what is derived from the confessions of the prisoner, given under oath in the police court and before the grand jury. It very rarely happens, that a prisoner is put on his defence for a crime, where the evidence is obtained through his own testimony, given as a witness for the government against another person. On the subject of confessions, the rule of law is, that a confession is to be taken all together, no part of it is to be rejected, unless it carries on its face a palpable falsehood. It is, however, competent for the government to contradict it by other testimony. The rules of evidence have been established, on great consideration, by the greatest and wisest judges, both here and in Great Britain, and are intended for the protection of individuals, as

Commonwealth v. Woodward and another.

well as of the government. Now the prisoner confesses how he came by the fish, and declares, that he thought it ruleable, that what fell from the barrows, in the transportation from the vessel, was a perquisite, and of right belonged to the apprentices. And you will recollect the testimony of Vannever and of some of the other witnesses on this subject. This may be, and I think it surely is, a bad practice, and it is exceedingly doubtful whether the property would be changed under such circumstances. But if the prisoner sincerely believed, that there was such a custom, then, though he might be answerable in a civil action for the value of the fish, he could not be considered as guilty of a felony, which always implies a fraudulent taking against the will of the owner. If doubts exist in your minds as to the prisoner's intention, you are bound, in such case, to let the evidence of his good character weigh in the scale of innocence. For a good name is then of all importance, when it is wanted, to dissipate the clouds of suspicion, where there is no positive evidence of guilt.

The prisoner was found not guilty.

H. H. Fuller, counsel for Stickney, then renewed the motion for his discharge, and argued, that though Jackson had not been tried, yet Stickney could never be convicted on this indictment, as he is charged as an accessory to a felony, which has been committed by two persons.¹ Austin offered to proceed with the trial, if he would waive his objection arising from the circumstance of the principal not having been convicted. But he would not consent. The court denied the motion, and ordered the case to be continued, noting on the record, Stickney's appearance at the present term, for the security of his bail.¹

¹ Plowd. Com. 97; Foster's C. L. 361; 9 Co. 119. The statute of 30 Geo. II. c. 24, is considered in England, as extending to every case, where a party has obtained money or goods, by falsely representing himself to be in a situation in which he was not, or by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit. (3 T.

JUNE TERM, 1824.

COMMONWEALTH v. ROBERT RILEY.

A bank bill of another state is a promissory note within the statute of 1804, c. 120. [Rev. Stat. c. 127.]

On the trial of an indictment for passing counterfeit bills of a bank in another state, the testimony of experienced brokers, to the fact of the existence of such bank is sufficient.

The omission of the final *e* in the word "*Keene*," in an indictment, is not a fatal variance.

THE prisoner was tried on two indictments, each for a similar offence of uttering and publishing counterfeit bank bills, and a verdict was rendered against him upon each.

Davis, solicitor general, for the commonwealth.

S. D. Parker, for the prisoner.

THACHER, J., upon a motion for a new trial, and in arrest of judgment, delivered the following opinion. In the indictment against Robert Riley, which is on the first section of the act of 1804, c. 120, he is charged with uttering and publishing a forged and counterfeit promissory note for the payment of money, with intent to defraud one Frederic Slocumb, he knowing at the time that the bill was counterfeit. The note, which is set forth "according to its purport and effect," is a bill of the Cheshire Bank in Keene, N. H. At the trial, Thomas Dean, who has been an eminent broker and money-changer in this city for many years, testified, that there was such a bank at

R. 98.) Russell on Crimes, by Davis, 1360, note. The ingredients of the offence are, obtaining the goods by false pretences, and with an intent to defraud. But see *Commonwealth v. Fisher Kingsbury and another*, (5 Mass. R. 106,) where it was decided that when a felony or misdemeanor is in fact committed, a conspiracy to commit such felony or misdemeanor, cannot be indicted and punished as a distinct offence

Keene, N. H., that he was well acquainted with the bills of that bank, and that the present bill was a clear forgery. It was objected at the trial by the prisoner's counsel, that the bill ought not to go in evidence to the jury, because 1st, a bank bill is not a promissory note within the stat. of 1804, c. 120; and 2d, because if it should be deemed to be technically a promissory note, within the meaning of that statute, still it ought not to go to the jury, until the existence of the bank should be first proved by the production of an attested copy of the charter. A third objection was made, that in setting forth the bill, the final *e* in the word *Keene* is omitted in the indictment, which variance is alleged to be fatal. These objections were overruled at the trial, and they are now again offered, after verdict, to avail in arrest of judgment, or for a new trial, as the court shall decide.

The form of the indictment, which was drawn by the solicitor general in this case, and the proceedings at the trial, are conformable to the practice of the supreme judicial court in such cases. It has been decided in that court, and I cannot doubt the correctness of the decision, that a bank bill is a note for the payment of money, and it is apparent, that it partakes of all the qualities of a promissory note of hand. And hence it follows, that a bill of a bank of another state is clearly within the first section of the act of 1804, c. 120. The bill in question is the note of a bank established in another state. Now, we have no jurisdiction over the officers of such bank, to compel their personal attendance as witnesses, nor to produce their charter, or even a certified copy of it. These would be the best evidence of the existence of the bank, and of the genuineness of the bills. In the absence of such testimony, the best evidence which is in the power of the government to produce, is that of persons, who are within the jurisdiction of the court, and who know the existence of the bank, and the character of the bills. Such evidence has been produced at this trial to the satisfaction of the jury.

I am sensible, that it has been the practice in this court in similar cases, of bills of a foreign bank, to declare upon the fourth section of the act, in which the party is charged to have had in possession a counterfeit bank bill, in the similitude of the genuine bills of the bank established within such state, for the purpose of rendering it current as true, and knowing the same to be counterfeit. I confess that I have thought, that the production of the charter in such case was very proper, if not necessary. But aware of the difficulty of procuring such highest degree of evidence, I have yielded to a long course of practice in this court, which has been justified by the approbation of my learned predecessors. I am entirely satisfied with the legal correctness of the proceedings in this case, and that they are conformable to the practice of our highest judicial tribunal, as was settled on solemn argument, in the case of the *Commonwealth v. Carey*, (2 Pick. 47.)

As to the third objection, of the variance between the note and the recital in the indictment, the rule of law is, that where by omitting a letter, it produces a different word or a different meaning, the omission is fatal to the indictment. But in this case, the omission of the letter *e*, produces no difference in the sound or signification of the word.¹

The motion of the prisoner's counsel in arrest and for a new trial, is therefore overruled. The prisoner was sentenced to six years in the state prison.

¹ See D. Davis's Practical Treatise, 390.

JULY TERM, 1824.

COMMONWEALTH v. ISRAEL HERSHELL.

In the trial of an indictment for obtaining goods under false pretences, which set forth that the defendant had obtained the goods under pretence of sending them to Charleston, S. C., the evidence of the person usually employed to cart goods for the defendant, that no goods had been carried by him for the defendant, to any ship bound for that port, was *held* to be admissible.

To convict a person indicted for obtaining goods under false pretences, it is sufficient for the jury to be satisfied, that the false pretences were a material inducement to the party to deliver the goods, and that without such pretences the goods would not have been delivered.

THE defendant was tried on three indictments, which were found at the last term of the court, founded on the act of 1815, c. 136, for suppression and punishment of cheats. (Rev. Stat. c. 126.) The first was for obtaining goods from Messrs. Hicks and Arnold, of the value of two hundred dollars. The second was for obtaining goods from Benjamin Dow, of the value of five hundred dollars. The third was for obtaining goods from Messrs. Isaac Livermore & Co., of the value of eight hundred dollars. The offences were severally alleged to have been committed on the 8th of May, 1824. The false pretences were set forth and negatived in due form, and the prisoner was charged, in each case, to have obtained the goods, with the fraudulent intent to cheat and defraud the owners.

At the June term the several indictments were continued, on the motion of the prisoner, founded on affidavit, that he could not proceed to trial with safety, by reason of the absence of material witnesses, and because there had not been sufficient time allowed to him to prepare for his defence. By consent of counsel, the three indictments were committed to the same jury.

The witnesses were then sworn, and examined at great length.

The object of the cross-examination was to show, that the goods were not delivered on the false pretences assigned ; but that independently of those considerations, the prisoner had obtained the credits from the prosecutors respectively. The course of his various dealings with each was fully detailed, and he was permitted to show his general conduct and standing, from the commencement of his dealings in Boston as a merchant. It appeared that he was about twenty-two years old. He was a Polish Jew, born in Warsaw, had passed some time in England, and arrived in the United States in the fall of 1823. After passing some time in Canada, he came to this city in December last, and commenced business in company with one Joseph Harman, who was likewise from Poland. They took a shop at the north part of the town and dealt in furs, particularly in making and selling fur caps. In the course of the last winter he was introduced by one Goldsmith, a Jew, to Messrs. Hicks and Arnold, and beginning by obtaining a credit for small sums, he gradually inserted himself into their good opinion and confidence, appearing to be punctual in his payments, attentive and active in business, and making a show of money. He had several watches, of which he was fond of making a display. He usually referred to them for his character and credit. In the month of March last, Harman, the partner, went to Charleston, S. C., carrying a few boxes of goods, which, however, were not of any great value, and proved to be quite unsaleable. Of this circumstance, Hershell availed himself to represent to Hicks and Arnold, to Benjamin Dow, and to Isaac Livermore, that he had a commercial establishment in Charleston, under the care of his partner there ; that they were extensively engaged in business there ; that he had sent to him large quantities of goods, obtained on credit from merchants in Boston, to be sold there ; that he was receiving, and expecting to receive, remittances from his partner in cotton and rice, and had been authorized by him to draw to a considerable amount ; and that the business proved highly profitable. It appeared that Harman was quite a

simple man, a tailor by trade, and wholly without experience in mercantile dealing; he had no store in Charleston; had not been able to sell there more of his goods than sufficed to pay his expenses; and this was well known to Hershell. For in a letter of the 29th of March, written by Harman in the Hebrew character, but in a dialect of the German language, he gave to Hershell a deplorable account of his situation and prospects, intimating that he was without clothing, and begging him to furnish supplies for his necessities. But in another part of this letter, written in English at Harman's request, by a clerk in a store there, he gave a very different account of himself, mentioned that his goods were selling at a considerable advantage and profit, and authorized him to draw on him at three and four months, on account of the sales which he had effected. It further appeared, that Hershell had not sent a bale of goods to his partner in Charleston. On the 8th of May, he obtained credits of goods, to the amount of about two thousand dollars of the prosecutors, on his express declaration, that they were to be sent to Charleston by the Mayne, a regular trader between that place and Boston, and which was to sail on the 11th of May. He said that the goods would not be sent to his store, but on board the vessel. They were, however, immediately taken to his store, and on the day following, a part of them, amounting to above seven hundred dollars in value, were delivered to one Jacob Myers, a Jew, by whom they were sent to auction, and sold for cash on Hershell's account. It did not appear what became of the rest, but nothing was sent by the vessel, though Hershell told Mr. Dow, after her departure, that a bale of sheetings bought of him, had been put on board. It further appeared, that, since March, he had been in the practice of obtaining advances in cash from Mr. Myers, and of immediately transferring goods to him, which he obtained on credit, for the purpose, as he alleged, of sending to his partner in Charleston; and that these goods were always sent to auction, and sold on Hershell's account for cash, and usually at a great loss.

The prisoner's first application to Mr. Livermore was on the 8th of May. He was induced to let him have the goods on his representation, that they were to be sent to Charleston, and on finding, upon application to Hicks & Arnold and others, that the account which he gave of himself and of his establishment at Charleston, was true. Hershell had been known to Mr. Dow for some months, and had succeeded in a degree to establish a credit with him. But Dow testified, that, had he known, or suspected, at the time, that the goods would not be sent to Charleston, but that they would be sold here, he should not have delivered them ; because they could not be sold here but at a great sacrifice, and he should have at once believed, that there was something on the part of Hershell which was wrong. The prisoner was by all accounts plausible in his manners, was ingenious, and had displayed no small talent and dexterity in gaining the confidence of the prosecutors and of others in this city. What led to the prisoner's arrest, was the discovery by Messrs. Livermore and Dow, that the goods were selling at the auction of Jacob Peabody & Co., in this town. He was first arrested on civil suits, and afterwards this complaint was preferred for the fraud. Hershell had not paid a dollar for the goods, and no evidence was offered by him, to show what had become of the property, except what was transferred to Myers.

The prisoner's counsel rested his defence on the facts :
1. that he had a partner actually residing in Charleston. 2. That while they were here, they did considerable business together, and were in good credit. 3. That his partner in Charleston had actually written a letter to him, in which he had authorized him to draw on him for an amount of money ; and hence they inferred that he did not make use of any false pretence. 4. That he was not trusted on the false pretences which are alleged in the indictments, but that the goods were delivered on other considerations, and that if the government should fail to

prove that the goods were delivered on these pretences alone, the prosecution must fail.

After examining some witnesses, Joseph Harman was introduced, and various letters which passed between him and the prisoner, while he was in Charleston, were read in evidence. In the letter of March 29th, he informed Hershell that he arrived in Charleston on the 22d, and authorized him to draw for some amount at three and four months, and said he could sell goods at twelve per cent. advance on light clothing, and in subsequent letters said he could do well with dry goods in the country, and wrote for French goods, ribbons, &c., to be sent. The part of the letter of the 29th of March, written in German, which was offered in evidence by the prisoner, was translated and put into the case by the government. Also, two letters addressed by Harman to the prisoner, written in the German language, and which were intercepted and taken from the post office by Hicks & Arnold, by advice of their counsel, after the prisoner's arrest and commitment, were likewise put into the case, with a translation of them. The reason assigned by the prisoner's counsel for not sending the goods to Charleston, was, that Hershell being in debt to Myers, the latter took out a writ and threatened to attach his property, and so, to avoid his urgency, he transferred the property to him.

A witness was offered by the government, to prove that he usually was employed by Hershell in transporting and carting goods, for the purpose of showing, that no goods were by him sent on board any vessel bound to Charleston. The counsel for the prisoner objected to this testimony as irrelevant; but the court decided, that as the government had alleged that the prisoner had obtained the goods, on the pretence of sending them to his partner in Charleston, they were bound to prove that this pretence was false, and that the evidence offered, having that tendency, was admissible. The government also offered to prove, that after Hershell's arrest, he applied to a friend to secure his property by a fictitious attachment. To

this the prisoner's counsel objected, on the ground, that there was no allegation in the indictment, which averred this fact, and that to admit the evidence would operate as a surprise on the prisoner. It was no more proper, than it would be to show that he had wasted his property by scandalous dissipation, in infamous vices, and among profligate companions. The counsel for the government argued, that it would be evidence of the intent to defraud. But entertaining a doubt of the legality of the evidence, the court did not admit it to go to the jury.

Austin, county attorney, and *George Morey*, specially appointed to assist him, for the commonwealth.

William Sullivan, and *S. D. Parker*, for the prisoner.

THACHER, J., then charged the jury substantially as follows: The present cause is very worthy of the attention which you have bestowed upon the investigation of its merits, and of the learning and eloquence which have distinguished the counsel, who have conducted it both for the prisoner and for the government. It is a case well deserving the attention of a jury of merchants, because the charge relates to commercial dealing, of which good faith, honor, and truth are the basis. If the unfortunate prisoner has committed the offences, or either of them, which are charged against him, he will have thereby subjected himself to consequences highly penal, but not exceeding the injury done to society. But inasmuch as the case is matter of civil life and death to him, I am sure, that you will weigh it in the golden scales of impartial justice, desirous to do right, fearing to do wrong, and bearing in your minds, that the duty, which has devolved on you, is of the highest trust and obligation, as you are to decide, by your verdict, whether a fellow-citizen shall be cut off in the bloom of life, from the society of the good, and consigned to that of the infamous. One other consideration imposes a heavy responsibility both on you and on myself. The case may be final here, from the inability of the prisoner to procure sureties, to prosecute an appeal to the

supreme court, should he wish to avail himself of a revision of the judgment of this tribunal. He stands before you for his deliverance on three indictments, which are of a similar character, though varying in some particulars.

The offence is one of that numerous and extensive class, which are denominated cheats. These are deceitful practices in defrauding, or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty. Prior to passing the act, on which the indictments in this case are founded, the distinction observed in these cases, was this ; in such impositions or deceits, against which common prudence might guard persons from suffering, the offence was not indictable, but the party was left to his civil remedy for redress. "The offence that is indictable, says Lord Mansfield, must be such as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing ; so, if a man defrauds another, under false tokens. For there are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat ; for ordinary care and caution is no guard against this." *Rex v. Wheatley*, (2 Burr. 1127.) The present indictment is founded on an act of this commonwealth, of 1815, c. 136, which enacts, "that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person, money, goods, &c., with intent to cheat or defraud any person," shall suffer the penal consequences which it contains. "This statute, which is a transcript of the act of 30 Geo. 2, c. 24, extends to cases, which were not the subject of an indictment at common law. The ingredients of this offence are the obtaining money by false pretences, and with an intent to defraud ; but some pretence must be used, and that pretence false ; and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within the statute." Per Buller, J., *King v.*

Young and others, (3 T. R. 98.) To constitute the offence then, there must be fraud in the party who obtains the property, which supposes a deliberate intention to deceive by an artful device, founded in falsehood, and of which in all cases the jury must judge.

It being then your duty to decide finally both the law and the fact, I think I shall be most assisting you in its performance, by directing your attention to the charges against the prisoner, as set forth in the indictments against him. Following their language, as a simple and correct guide, you will first inquire, on what pretences the prisoner is charged to have obtained the property ; secondly, whether those pretences, or any of them, were false ; and thirdly, whether the prisoner made use of those pretences, as an artful device to defraud.

I. The prisoner is charged with obtaining the goods of Messrs. Livermore & Co., on the following false pretences, viz. 1. That he had a partner in Charleston, in the state of South Carolina, whose name was Joseph Harman. 2. That he was in the practice of purchasing goods in Boston, and of shipping them to his said partner in Charleston for sale there. 3. That he expected shortly to receive remittances from his said partner in cotton and rice. 4. That he wanted to purchase a quantity of goods, to ship to his partner in Charleston, to be sold by him there, and that it was his intention to ship the same by a certain vessel, called the *Mayne*, which would sail on the 11th of May.

II. In the indictment for obtaining the goods of Benjamin Dow, the false pretences are alleged with some difference, which you will note. 1. That he said, he was extensively engaged in trade and commerce in copartnership with Joseph Harman. 2. That he had purchased goods, to a large amount and value, of sundry merchants of credit and property in Boston, for the purpose of shipping the same to his partner for sale by him in Charleston. 3. That he had received from his said partner remittances in money, to a large amount, for and on account of the trade and copartnership.

III. The false pretences are likewise alleged, with some variation, in the indictment for obtaining the goods of Messrs. Hicks & Arnold, in the following respect, viz. : That his partner in Charleston had written to him a letter, requesting him to purchase gingham, and had ordered the same to be sent to him, as he could sell them at an advance, especially in the country, of from twelve to fifteen per cent., that the same could be exchanged at Charleston for cotton and rice, at a great profit, in which articles he expected to receive remittances.

The witnesses prove, and indeed it is not denied by the prisoner, that he did obtain the goods from the several prosecutors, which are mentioned in the several indictments.

It has been contended, by the counsel for the prisoner, that you must be satisfied that the goods were delivered by the owners, and obtained by him, solely on the false pretences alleged ; and that if you find that other considerations entered into the minds of the prosecutors, the prisoner must be acquitted. And some cases, decided in the state of New York, are relied upon in support of this ground. Now I do not apprehend this to be the law ; and I am free to avow, that I feel bound to give to the act, what I deem a more reasonable construction, so as to make it a living, efficient agent in restraining and punishing fraud, and not a dead letter. For this purpose you are to have a full knowledge of everything which was said and done at the time, by the prisoner, and by all concerned in the transaction, so as to form a judgment of the motives which induced the prosecutor to deliver his goods, as well as the pretence alleged by the defendant for obtaining them. You may believe, that some considerations entered into the mind of the party giving the credit, other than those which are contained in the indictment ; but I am of opinion, that you will be authorized to convict the prisoner, if you believe, from the evidence, that the false pretence, used by him at the time, was a material inducement to the party to deliver his goods, and that he would not have so delivered them, without such false pretence. Sup-

pose that the prisoner had, by a course of punctuality, and apparently honest dealings, so far gained the confidence of the owner of the goods, that you believe he delivered them from that cause alone; then the false pretence used by the prisoner ought not to have any weight on your mind, because it was not a material inducement to the owner to part with his goods. But if, notwithstanding such course of punctuality and honesty, you believe, that without the false pretence used by the prisoner, the owner would not have delivered to him his goods, nor given to him the credit, then the use of such false pretence being a material inducement to the owner to part with the goods, the crime was thereby consummated. So if you should find, that the prisoner obtained a credit, by ingeniously mixing up truth and falsehood together; and if you believe that the credit would not have been given on a simple and fair relation of the truth alone; then the whole is to be considered as a false pretence, and an artful device for the purpose of fraud. And on this head, I conclude, that parting with the goods in consequence of the false pretence, and obtaining them by the use of it, are material ingredients, and essential to the completion of the offence.

The judge here recapitulated minutely the testimony of Isaac Livermore, of Charles Arnold, and Benjamin Dow, relating to the circumstances under which they respectively delivered to the prisoner the property mentioned in the indictment, and likewise the other material facts in their testimony.

Were the pretences alleged false? 1. Had Hershell a partner in Charleston? If from the evidence you believe that this man was sent to Charleston, to be a nominal partner only, a mere man of straw, that he might avail himself of the name of a partner, and of his residence there, to gain a credit here for fraudulent purposes, then it is to be by you regarded as a false pretence. 2. Was the prisoner in the practice of purchasing goods in Boston, and of shipping them to his partner in Charleston for sale? The government has given abundant tes-

timony, derived as well from the confession of the prisoner, as from the statements of witnesses, that he never sent either a bale or box of goods to Charleston. No evidence has been offered to rebut this on the part of the prisoner, and therefore you may fairly infer that it was a false pretence. It appears, from the testimony of Jacob Myers, that from the month of March last to the 20th of May, the prisoner was in the practice of sending goods, which were bought on the pretence of sending them to Charleston, to be sold at auction on his account. But you are to judge of the validity of the excuse, which has been assigned for the transfer of these goods to Myers. The prisoner being indebted to Myers, the latter, on the 15th of April, sued out a writ against him, and threatened an immediate arrest unless he would furnish security for his demand. This led to a settlement, and on the 11th of May there was a balance of three hundred and twenty-two dollars due to Myers. He insisted, as he says, on security, at that time, and on having it from the goods purchased of Messrs. Livermore & Co. Hershell said that they were bought to send to Charleston, and he should be ruined if they were not sent. To this Myers replied, "secure my amount and ship the residue." It is true, that Myers was made secure for that debt and for a further advance of cash, and the goods were sent to auction to raise a sufficient sum to repay him. But nothing was shipped to Charleston, of the whole amount purchased of the prosecutors, and you are to judge, whether the story of sending goods to the partner in Charleston was not altogether a false pretence, devised for the purpose of fraud.

It is not shown, that he had received any remittance from Charleston, and it is very apparent, from Harman's letters, that he could not expect to receive any. These letters are full of complaints and entreaties, relating to his distressed situation there, except that portion of the letter of the 29th of March, which is written in English. You are to judge, by comparing it with the German part of the same letter, and with the other let-

ters, written at the same period, if that letter was not altogether a false pretence, ingeniously enough contrived to impose on unsuspecting individuals here. If after a full survey of the evidence in the case, you believe that the prisoner, availing himself of the false pretences alleged, did obtain from the prosecutors, or from either of them, their goods, and has appropriated them to his own purposes, it will follow thirdly, as a just and legal presumption, that the transaction was, on his part, an artful device to defraud, contrary to the plain rule of common honesty, and the burden of excusing himself and of justifying his innocence and integrity, falls upon the prisoner.

These, gentlemen, are the material points in this case. You are to weigh the evidence with candor, and if you entertain a reasonable doubt of any fact, you are to let that doubt weigh in favor of the prisoner's innocence. The eloquent counsel for the prisoner have repeatedly admonished you, not to suffer yourselves to indulge a prejudice against him on account of his religion and nation. I trust we live in an age and in a country where such prejudice is but little felt, and where such caution is hardly necessary. The people of this commonwealth have recently declared their sense on this subject, by striking from the constitution a clause which excluded persons professing the Jewish religion, as well as Christians of the Roman Catholic denomination, from either branch of the legislature. No religious test is now required to qualify a citizen to execute any civil office in the state. In a religious view, Christians now regard the nation of the Jews as their elder brethren, to whom were first communicated, and by whom were preserved the oracles of the one living and true God, which contains the evidence of the divine origin of the Christian religion. The time has not yet arrived, when, according to the visions of prophecy, the scales will fall from their eyes. But the history of that wonderful nation, through a longer succession of ages than belongs to the chronicles of any other, indicates the fulfilment of the prophecy relating to their final restoration. And it is indulging no vain

Commonwealth v. French.

expectation, to look forward to the time, when the dispersed descendants of Abraham, the favored servant of Jehovah, will come into the Christian church, and thus be restored, in a most emphatic manner, to the New Jerusalem, the city both of their God and of our own.

The trial had continued through Monday and until Tuesday at twelve o'clock, when the case was committed to the jury. At five o'clock in the afternoon they returned into court with their verdict. They acquitted the prisoner on the indictments for defrauding Messrs Hicks & Arnold, and found him guilty on both the other indictments. The court met on Thursday morning, and after a short address from the judge to the prisoner, on the aggravated character of his offence in a commercial community, he was sentenced to suffer twenty days solitary imprisonment, and to be confined to hard labor for seven years in the state prison.¹

JULY TERM, 1824.

COMMONWEALTH v. JESSE FRENCH.

On the trial of an indictment for forgery, it was *held*, that the record and judgment of the police court could not be used in evidence, unless the circumstances of the prisoner's examination there, were first shown by the magistrate or some other person present.

THE prisoner was tried on two indictments for forgery. The first was for forging and publishing a note for \$150, purporting to be signed by William French, as principal, and Eleazer Beal, as surety, and payable in three months. The second was for forging and publishing a note for \$350, purporting to be signed by Samuel Burrill, and a guaranty on the back of the same, signed by said Burrill and by Isaac Spear and Washington

¹ This was the first conviction, in Massachusetts, under the act of 1815, c. 126, for obtaining goods by false pretences.

Commonwealth v. French.

Thayer. The case was made perfectly clear by the evidence on the first indictment. But on the trial of the second indictment, Thomas Dear, the witness, could not identify the prisoner, as the person who gave to him the note to be discounted. The county attorney offered to read the judgment and proceedings of the police court on the prisoner's examination there. But on an objection by the prisoner's counsel, the court decided that the proceedings of the police court were not evidence, *per se*, but that the magistrate, or some one present, must first show in evidence, the circumstances under which the prisoner was examined, and was induced to make any confession.

George Reid was then sworn and testified, that he was employed by the supreme executive, to go to New York, and bring the prisoner from thence, being charged with this forgery; that on his passage down the Sound, the prisoner read the warrant which was annexed to Governor Eustis's application to Governor Yates, and which contained a copy of the note, and that the prisoner said, of his own accord, without any advice, encouragement or threats used, that he should plead guilty to the charge, having understood, from certain prisoners with whom he was confined in the New York jail, that it would be more easy to get a pardon, if he should plead guilty; that the prisoner was carried to the police court in this city, and there, upon the complaint being read to him, he pleaded guilty voluntarily.

The jury, upon this evidence, found the prisoner guilty.

Austin, for the commonwealth.

John King, for the prisoner.

King, after verdict, moved the court to continue the case, till the prisoner should have an opportunity to apply to the governor for a pardon, on the ground that he had, prior to the commission of these crimes, sustained a good character. But the judge refused to continue the case for this cause, for the reason that it would be an intimation to the governor, that he considered the prisoner as a proper object of clemency, and that by sen-

Commonwealth v. Williams.

tencing him, he would not be deprived of any advantage, which he then possessed, of applying to the governor for the exercise of his clemency. He was sentenced to fifteen days solitary imprisonment, and to hard labor in the state prison for five years.

SEPTEMBER TERM, 1824.

COMMONWEALTH v. JOHN WILLIAMS.

Where goods belonging to different persons are stolen at one time and place, the offence may be set forth in one count in the indictment.

THE indictment contained one count, in which the prisoner was charged with a larceny, in the dwelling-house of Levi Dame, of articles of clothing belonging to several persons. On his trial he was found guilty.

Gates, counsel for the prisoner, then moved in arrest of judgment, for the cause, that the prisoner was charged in the same count, with having stolen various articles, the property of three different persons. At the hearing, on the 13th of September, he insisted, that the indictment should have contained three counts, so that the jury might pass on each, and convict or acquit, according to the evidence.

Austin, for the commonwealth, referred to the Crown Circuit Com. 450, and 3 Chitty C. L.

THACHER, J. If the property was taken at one time and in one place, I am of opinion it was but one offence, although the several articles belonged to different persons. And I conceive, that it is competent for the jury to except any portion of the property charged, if the evidence should not be satisfactory, and to render a verdict which should be conformable to the facts. I do not perceive, that the prisoner would in such case be subjected to any disadvantage. It is rather favorable for him. For if the goods of each person must be contained in separate

Commonwealth v. Bean.

counts, and the taking in this manner is to operate as several offences, then separate indictments might be brought, and although the party may have taken but one bundle, or case, and only in one instance, yet he may be tried, convicted and punished as for several offences. But this is not conformable to our practice, nor justified by authority. "For it seems to me," says Lord Hale, (1 P. C. 531,) that if at the same time, the party steals goods of A. of the value of 6*d.*, goods of B. of the value of 6*d.*, and goods of C. of the value of 6*d.*, being perchance in one bundle, or upon a table, or in one shop, this is grand larceny, because it is one entire felony, done at the same time, though the persons had several properties, and therefore, if in one indictment, they make grand larceny." In the case at bar, the goods were all found at the same time in the prisoner's chest, and there was no evidence that they had been taken at different times. Charging the prisoner with but one offence, in taking the whole at one time, is most favorable for him; and being of opinion that the indictment is correct in form, the motion made in arrest of the judgment is overruled.

OCTOBER TERM, 1824.

COMMONWEALTH v. STEPHEN BEAN, APPELLANT.

Upon a trial, under the ordinance of the city council of the city of Boston, of 1824, regulating the keeping of dogs, and directing one half the amount paid for a license to be paid to the city clerk, and one half of the penalty for the violation of the ordinance to be paid to the prosecutor, without declaring to what use the other half should be applied; it was *held*, that it could not be inferred, that any sum enures to the city, although it was stated, in the original complaint, that the other half of the penalty was for the use of the city, and, consequently, that the justices of the police and municipal courts and the jurors were not interested by reason of being paid by the city.

Where, after a complaint had been instituted against a person for the violation of an ordinance of the city of Boston, in which complaint the charter of the city and the ordinance were not set forth, the legislature passed an act, declaring it sufficient to set forth the substance of complaints before the police court, without setting forth the special acts of the legislature, or the ordinances or by-laws of the city, on which they were founded; it was *held*, that the act did not operate as an *ex post facto* law, but only affected the forms of proceeding.

Under the twenty-third article of the bill of rights, which declares that no tax shall be imposed on the subject, without the consent of the people, and under the statute of 1821, c. 146, (Rev. St. c. 58,) which allows any dog to go at large, if he wear a collar with the name of the owner on it, it was *held*, that the city of Boston had no authority to pass an ordinance, requiring from the owners of dogs going at large the payment of a sum of money for a license.

THIS case was a complaint, founded on the ordinance of the city council of the city of Boston, passed April 29, 1824, "for regulating the keeping of dogs in the city of Boston." At the term of this court in September, the defendant appeared and pleaded, "protesting that he was not guilty of the premises charged in the complaint, he saith that he ought not to be compelled to answer the said complaint, because the justices and clerk of the police court, before whom the same was originally indicted, entered, heard and tried, are rateable and rated inhabitants of the said city of Boston, and dependent for their salaries, respectively, as such justices and clerk, on annual grants to be made at the will of the city council of said city, and the judge and clerk of this court are also rateable and rated inhabitants of said city, to the use of which a part of the penalty or forfeiture is to enure; wherefore they are concerned in interest in the matters charged, and said courts are not proper to try the same, and the matter charged should be heard before some justice of the peace in Chelsea. To this the attorney for the commonwealth demurred, and upon the same being joined, the plea was adjudged insufficient in law, and said Bean was required to answer further.

The jurors being then called, Bean challenged the array of the panel, because the judge and clerk of this court, by whom the writ of *venire facias* for the summoning of the said jurors was awarded, the mayor and aldermen of the city of Boston, who drew and selected the said jurors, the sheriff of the county of Suffolk, and the constable who served and returned it, at the time of the issuing of the writ, and continually afterwards to this time, were and are rateable and rated inhabitants of said city, and so concerned in interest. Upon a demurrer and joinder, the court overruled the plea, and adjudged that the panel was sufficient in law. And so likewise the separate challenges to each of the jurors by the defendant for the same cause were overruled. The attorney for the commonwealth then offered to read the by-law or ordinance, on which the complaint was founded. But the defendant objected to it, on the ground that there was no statute or law empowering the city council to make such by-law. The judge, however, admitted it to be read in evidence. The defendant next objected to David Eckley as a competent witness, because he was a rated inhabitant of the city. But this objection also was overruled, and he was admitted to testify. The witnesses for the prosecution, and likewise for the defendant, were then heard, and the counsel for the defendant and the attorney for the commonwealth argued on the law and the evidence fully to the jury.

Austin, for the commonwealth.

Benjamin Rand, for the prisoner.

THACHER, J., in committing the case to the jury, stated to them, that no question of fact was contested by the parties, but whether the dog was loose or at large within the meaning of the ordinance. The court had permitted evidence to be given of the character of the dog, and of the measures taken by the defendant to keep him from going at large. It was for the jury to decide, whether from the nature of the animal, always loving liberty and desirous to go at large, and from the evi-

dence of the disposition of this dog, it was not incumbent on the defendant to keep him chained or confined to a room, if he did not intend that he should go at large; and whether, by not keeping him under such restraint, he did not take on himself the risk, if the dog should be loose in the street. If, however, they believed, from the evidence, that the defendant had used due care and caution in restraining the dog, and that his being at large was accidental, and without the defendant's fault; then it would be their duty to acquit him.

The jury found the defendant guilty, saying at the time that they were of opinion that the dog was not kept by him under sufficient restraint.

The case was continued, and by agreement of the parties they were heard by the judge at the Law Library, on Monday, the 13th of September; and on Thursday, October 7, 1824, the judge read the following opinion.

This case comes to this court by appeal from the judgment of the police court of this city. It was commenced on the 29th of May last, and the judgment was rendered on the 23d of June following. It is a complaint made by Benjamin Pollard, Esq., city marshal, in the name and behalf of the commonwealth, founded on an ordinance of this city, which was enacted on the 29th of April last, to "regulate the keeping of dogs within the city of Boston," against Stephen Bean, to recover of him the penalty of ten dollars, for permitting a certain dog, belonging to him, to go at large, "he not having paid to the city clerk the sum of five dollars for said dog to go at large, against the ordinance aforesaid." The preliminary objections, made by the defendant's counsel, to the jurisdiction of the police court, and of this tribunal; to the array of the panel of jurors, and to each juror; to the competency of David Eckley as a witness; and to the validity of the ordinance; were overruled at the trial, it being understood at the time, that he was to be heard upon them, and that they were to be deliberately settled afterwards. The jury

returned a verdict against the defendant. Since the verdict was rendered, the counsel for the parties have been fully heard ; and I confess myself to be much indebted to their laborious and faithful investigation of the several points of law, exhibiting an array of authorities and arguments, which were worthy of a cause of greater magnitude ; and yet I am accustomed to think, that all questions of criminal law, affecting either the life, the liberty, or the property of the subject, are of magnitude, and worthy of the best efforts of the ablest practitioners ; and I wish that counsellors of eminence oftener found it for their interest to appear here in the defence of the unfortunate. Sure I am, their learning and eloquence would not be lost either on the court or jury ; and if it should have no other effect, it would certainly lead to great circumspection in the administration of criminal justice. As the present is a prosecution, founded on an alleged violation of law, the government is to be held strictly to maintain the complaint, both in form and substance, and the defendant is entitled to the benefit of all legal presumptions in his favor. For forfeitures and penalties are odious, and are not to be inflicted in doubtful cases.

1. The first point of law, on which the defendant relies, is, that the complaint was instituted before a court which was not proper to try it, because one half of the penalty will enure to the city, of which the justices of that court were rateable and rated inhabitants. That a judge must not be interested in the cause which he is to try, and that an act giving authority to a man to be a judge in his own cause, would be against magna charta in England, and against our own constitution here, are truths, which require neither proof nor comment. It is sufficient, that the principle is recognized by our supreme court, in the case of *Pearce v. Atwood*, (13 Mass. R. 324,) and it cannot be better expressed, than in the language of Lord Mansfield, in the case of *Hesketh v. Braddock*, (3 Burr. 1847.) "There is," he says, "no principle of law more settled than this, that any degree, even the smallest degree of interest in

Commonwealth v. Bean.

the question depending, is a decisive objection to a witness, and much more so to a juror, or to the officer by whom the juror is returned ; and that the minuteness of the interest will not relax the objection ; for the degrees of influence cannot be measured ; no line can be drawn, but that of a total exclusion of all degrees whatever." But while the general principle is acknowledged, it is contended, on the part of the government, that the present is an exception, and that it was necessary for the justices of the police court to take jurisdiction, or there would be a failure of justice, which would be a reflection on the wisdom of the government. *Mostyn v. Fabrigas*, (Cowp. 161.)

Was it necessary, then, that this prosecution should be brought in the police court ?¹ By the act of 1821, c. 109, s. 2, (Rev. St. c. 87,) to the justices of the police court is given "cognizance of all crimes, offences, and misdemeanors, whereof justices of the peace may take cognizance by law, and of all offences cognizable by one or more of said justices, according to the by-laws, rules and regulations, which may be established by the proper authority of the city of Boston." And by the third section it is provided, "that no process returnable before a justice of the peace residing in the town of Chelsea, except for causes of complaint arising in Chelsea, shall be served

¹ By the act of 1801, c. 62, "all fines and forfeitures accruing for the breach of any by-law in any town within this commonwealth, may be prosecuted for and recovered before any justice of the peace in the town or county, where the offence shall be committed, by complaint, in the same way and manner other criminal offences are now prosecuted before justices of the peace within this commonwealth." Prior to that time, by the act of 1793, c. 43, "all pecuniary fines or forfeitures, recoverable by bill, plaint or information, or for recovery whereof no mode shall be prescribed, shall and may be sued for and recovered by action of debt, in any court proper to try the same." By the act of 1817, c. 50, "all fines, forfeitures, and penalties accruing within the said town of Boston, for the breach of any by-law, may be recovered by indictment, information or complaint, in the name of the commonwealth, in any court competent to try the same ; and all fines so recovered and paid shall be appropriated to the uses for which the same are now by law ordered to be applied."

Commonwealth v. Bean.

within the city of Boston." So that in this complaint, arising in this city, the jurisdiction of the case, whether in form of a civil action or of a criminal complaint, does, in fact, belong to the justices of the police court, inasmuch as no process can be served on the defendant, which should be made returnable before a justice of the peace in Chelsea. It was necessary, therefore, that the justices of the police court should take jurisdiction in this case. And appeals from that court this tribunal must sustain for the same cause. Now, if it were true, as is alleged, that half the penalty in this case goes to the city treasury, it could not be denied, that we have a remote corporate interest in the event ; yet inasmuch as the jurisdiction is expressly conferred on us by statutes of the commonwealth, "the law must be considered as repelling the interest," which otherwise existed, according to the decision of the supreme court in the case of the *Commonwealth v. Thomas Ryan*, (5 Mass. R. 90.) But on examining the ordinance in this case, it does not appear, that either the sum, which is to be paid for the license, or the penalty for its violation, enures to the city — the former goes to the city clerk, who is not required to account for it, and half of the latter to the prosecutor. The ordinance might have declared to whom, or to what use the other half should go. But in the silence of the ordinance on this subject, I cannot infer, that it is for the use of the city of Boston. And although it is said in the complaint, "that the other half is for the use of the city," that doth not appear by inspection of the ordinance, and on its payment to the treasurer, it must be passed by him with all other fines and penalties to the credit of the commonwealth. Hence, all the objections to the competency of the justices of the police court, to sustain the original complaint ; to the judge and clerk of this court ; to the array of the panel of jurors by the mayor and aldermen by whom they were drawn ; to each of the jurors ; and to the competency of Mr. Eckley as a witness, must fall to the ground ; it not appearing that we have

any more interest in this penalty, than in any other fine, which is paid to the commonwealth.¹

2. The second objection on the part of the defendant is, that the complaint is essentially defective in form, and that no judgment can be rendered on it. The complaint sets forth, that, "by virtue of an act of the commonwealth, entitled 'an act establishing the city of Boston,' the mayor and aldermen, and common council, upon the 29th of April, 1824, passed a certain ordinance to regulate the keeping of dogs within the city, in which it is, among other things, ordained, that from and after the passing of said ordinance, no dog shall go at large or loose in any street, lane or court, nor in any uninclosed or public place in this city, until the owner or keeper of such dog, or the head of the family, or keeper of the house, where such dog is kept or harbored, shall have paid to the city clerk, the sum of five dollars for a license for such dog to go at large; nor unless he shall cause a collar to be constantly worn by such dog, having the christian and surname of the owner thereof legibly written or engraved, or stamped thereon; and also, that in case any dog shall be found loose or going at large as aforesaid, contrary to the provisions of said ordinance, the owner, &c., shall forfeit and pay the sum of ten dollars, one half for the use of the city, and the other half for the use of the prosecutor, to be recovered by complaint before the police court." After this recital, it charges, that the defendant, on the 25th of May, 1824, was the owner and keeper of a certain dog, which was then and there found loose or going at large in Beacon street, he not having paid to the city clerk the sum of five dollars for a license for said dog, against the ordinance aforesaid." It is objected to this complaint, that the charter of the city and the by-law are not set forth. But, by the fifth section of the act of 1824, c. 28, it is declared, "that in all prosecutions before the police court, founded on the special acts of the legis-

¹ Hobart, 87; 1 Bl. Com. 91; Mag. Car.; 8 Co. 118; Com. Dig. tit. Parliament.

lature, or the ordinances or by-laws of the city of Boston, it shall be sufficient to set forth in such complaint the offence fully and plainly, substantially and formally, and in such complaint it shall not be necessary to set forth such special act, by-law, ordinance or any part thereof." Thus these special acts and by-laws are placed on the ground of general laws, and it is made the duty of the court to take notice of them, without the record being incumbered with their recital at full length.¹ But to this it was argued, that as this act was passed after the complaint had been instituted, although before the judgment was rendered in the police court, it did not cure the defect, because it would operate like an *ex post facto* law, and so would be contrary to the 24th article of the bill of rights. But this act was not made to punish an innocent action done before the existence of the law, but operates only in the forms of proceeding. The only effect of quashing the present complaint for this cause would be, to authorize a new one to be brought in precisely the same words; for there is no doubt, that the complaint is set forth with sufficient regard to legal form as the law now is; although some doubt might exist, whether it was sufficiently formal prior to this last act of the legislature. For these reasons, I am of opinion, that this objection to the complaint is not sufficient to set aside the proceedings.²

3. The great objection to the ordinance, on which the counsel for the defendant principally relies, is, that the city authorities had no right to pass it, because it contravenes the general laws of the commonwealth. It is argued, that it is not within the objects for which towns are incorporated, and that it is not made pursuant to law; but that it is an independent and unauthorized act of legislation, which neither the city of Boston nor any other town in the commonwealth could enact. It becomes therefore necessary to consider the extent of the power of towns

¹ Peake's Law of Evidence, 5th ed. 27, note (a.)

² Bos. & Pull. 98; Com. Dig. tit. Parliament R. 5—7; 4 W. & M. c. 15.

to enact by-laws, it being justly admitted by the attorney for the commonwealth, that this city has no other or greater power in this respect, except as to the penalty for their observance, than any other town in the commonwealth. The inhabitants of each town are declared by law (1785, c. 75,) "to be a body politic and corporate, and are empowered to make such by-laws for directing the prudential affairs of their town, as they shall judge most conducive to the peace, welfare, and good order thereof, and to annex penalties for the observance of them, not exceeding thirty shillings for one offence, to enure to such uses as they shall therein direct, provided they be not repugnant to the general laws of the government." Like power is considered, at common law, as necessarily and inseparably incident to every corporation. (1 Black. Com. 475.) And the same power is given to this city by the fifteenth section of the charter, pursuant to the second amendment to the constitution of the commonwealth, with authority to annex penalties, not exceeding twenty dollars, for the breach of any city by-law, and with a further provision, that any by-law of the city may be annulled by the legislature.

The objection to this ordinance does not arise from its containing a penalty, but because a penalty is declared, to enforce the observance of a by-law, which imposes the payment of what is deemed to be an illegal tax. It is argued, that it is illegal, because by the general law of the commonwealth, (1821, c. 146,) any dog may go at large, provided he wear a collar with the name of his owner on it, the owner being answerable for any damage which he shall commit in double the amount. But this ordinance declares that, within this city, no dog shall go at large unless his owner shall take out a license, for which he shall pay five dollars. The object is to discourage the keeping of dogs by confining the number to those persons who are able and willing to pay five dollars for the privilege. I confess there is good reason for such regulation, when it is considered that this animal is liable, especially during the hot season of the

year, to a species of madness, which is highly dangerous and destructive to human life. But although there is excellent reason for diminishing the number of dogs, yet I do not see, if it is competent for the city to impose a tax upon the owners of dogs, why they may not also on the owners of other domestic animals, as horses, goats, swine and singing birds ; why not on retailers and innholders ; why not on the owners of trucks and of carts ; and on many other persons and objects, which it would be easy to enumerate ? It is argued, however, that dogs are a nuisance, that they are considered as mischievous and dangerous animals by the general law of the commonwealth, and that this ordinance is in aid of those laws and not repugnant to them. But to this I reply, that if it were true that they are a nuisance, what right has the city to license such nuisance, and to derive a revenue from it ? It is not true, however, that they are a nuisance, and for many purposes they are considered as valuable domestic animals. The objection to the tax arises from the twenty-third article in the bill of rights, which declares, that no charge, tax, impost or duties shall be imposed on the subject, without the consent of the people, expressed by an act of the legislature. I know of no case wherein a town may undertake to assess money on the inhabitants, or on any portion of them, even with their consent, directly or indirectly, unless with the sanction of a legislative act. Thus to defray the expenses of civil government, to support religious worship, schools, paupers, and highways ; for the most useful purposes of municipal order and comfort, as maintaining lamps in the streets, providing a watch, preserving the public health, and removing nuisances ; and so likewise to enable the city government to order many things of great necessity and convenience, as, regulating the erection of wooden buildings, of livery stables, and providing fire engines, and regulating proceedings at fires, paving the streets and sidewalks, the standing of carts and trucks in the streets, the keeping and transportation of gunpowder, and the carrying on of divers trades, there are general or special

laws of the commonwealth, authorizing assessments, and containing proper regulations. If these things belong to the prudential affairs of towns, which they in their corporate capacity might regulate ; why this expense and minuteness of legislation ? I know not any instance, in which a town has ever before assumed the authority of granting a license for what is permitted to be done by the laws of the commonwealth ; and this is the first instance known to me, not only where the question has arisen, but where a town has undertaken, without an act of the legislature, to require the citizens to pay a sum of money for the enjoyment of a privilege, which they would otherwise be entitled to enjoy freely. The acts of the legislature are the supreme law of the land. It is not competent for individuals or for towns to add to them, or to take from them. Were it otherwise, there would be neither freedom nor safety. The legislature has always shown great readiness to pass any laws for the government of this town, its peace, health, ornament or safety, which were requested by the inhabitants, or by their representatives in the general court ; and I cannot doubt their readiness to sanction a law, similar to that which is now in question, upon the application of the city council for that purpose. But that any city or town in the commonwealth may add to, or limit the acts of the legislature, supposes these corporations to possess a paramount power of legislation ; and if they may add to the general laws, they may also repeal the fundamental laws of the state.

A similar question arose in England in the time of Charles II. It was the case of *Player v. Vere*, (Sir Thomas Raymond's Rep. 288 — 324.) The mayor, aldermen and common council of the city of London, claiming under an ancient prescriptive right to make such ordinances as were profitable, agreeable to good faith, and reasonable, upon the 2d of April, 1677, in common council enacted, that the governors of Christ's Hospital should have the government of all cars, carts, and cartmen within the city ; that no more than four hundred and

twenty carts should be allowed to work from place to place within the city; that each of them should have the city arms upon the shaft, in a piece of brass, with the number of it; that 17s. 4d. per annum should be paid for a car-room, and 20s. upon any admittance or alienation of a car-room, which sums were to be applied towards the relief and maintenance of the poor orphans in that hospital; and that if any person should presume to work any car within said city, for hire, by himself or servant, not being duly licensed, such person should, for every such offence, forfeit and pay 13s. 4d. The defendant was arrested in the city and imprisoned on a bill of debt for 13s. 4d., on the 2d of November, (29 Car. II.) upon the act, and brought a writ of *habeas corpus*, returnable into the King's Bench, to remove the cause into that court, and to know why he might not be discharged. The case was repeatedly argued with great learning and ability by very eminent counsel on both sides. Against the by-law it was alleged, "that it was unreasonable and void, because the common council had no power to restrain the number of carts, or to impose fines, and that so it was in restraint of the liberty of trade." Sir George Jeffries and Sir Robert Sawyer argued in favor of the by-law, "that though it was naught for the fine, it might be good for the rent; for a by-law might be good for one part and bad for another. And as for the number of carts, if they cannot be restrained, the streets would be pestered." After great consideration of the authorities, it was finally adjudged in Hilary term, (31 and 32, Car. II.) by the whole court, *nemine contradicente*, "that the by-law was not good by reason of the fine and rent, but in all things else very good." The reasons of this judgment are not stated, but it appears to me, that it was on the principle, that it was contrary to the liberties of England, to exact from the subject any money, whether as a penalty or for a rent, which was not warranted by law. (Mag. Chart. c. 29; 2 Inst. 45-47.) And so, I consider, is the law of this commonwealth.

It has been further argued, that the ordinance in this case is

TEACHER'S CRIMINAL CASES.

Commonwealth v. Bean.

~~statute~~ law, because in addition to a pecuniary penalty, it contains a forfeiture. By the second section, if any dog is found ~~house~~ or going at large in the city, whose owner or keeper shall ~~not~~ have paid to the city clerk five dollars for a license, the owner or keeper incurs a penalty of ten dollars. And in the fourth section it is ordained, that if any dog shall be found going at large, whose owner or keeper shall refuse or neglect to take out a license for him, it shall be the duty of the mayor to cause such dog to be destroyed. So that after the owner has paid the penalty, the dog is still liable to be destroyed, notwithstanding his owner may have furnished him with a collar, according to the statute. If then there were no doubt as to the right of the city to require the owners to pay for a license, and to impose a penalty for the neglect of payment, yet it is very clear that the ordinance is defective in requiring the dog to be killed; for by the general act and by the charter, the city can only annex a pecuniary penalty, of limited amount, to secure the observance of their by-laws. The forfeiture of the life of a dog is therefore clearly illegal. Hence the learned counsel for the defendant infers, that the ordinance is for this cause wholly bad, and he relies on the case of *Kirk v. Nowill and another*, (1 Term R. 118,) to support the position. The by-law in that case was made by a manufacturing corporation, and declared that certain articles, manufactured in a deceitful and unworkmanly manner, should be liable to seizure and be forfeited. The by-law prescribed no pecuniary penalty, but created a forfeiture of the article. Whereas the act of incorporation (21 Jac. I.) empowered them to make reasonable by-laws, and to annex to the breach a fine, or amercement only. In directing the seizure and destruction of the article, the by-law was not pursuant to the charter, and so was wholly bad. But in the case of *Player v. Vere*, which has been already relied upon as decisive in favor of the defendant upon another point, the whole court of King's Bench were of opinion, that a by-law might be good for part, although it might be bad for the residue; and it

Commonwealth v. Bean.

would thence follow, that so much as is good would be sustained in a court of justice, and the residue rejected. If then there were no other but this last objection in this case, I should have no hesitation to decide, that the ordinance is good for the penalty, but bad for the forfeiture. But as I am of opinion, that the city cannot require from the owners of dogs going at large the payment of a sum of money for a license, it is substantially defective and invalid for this cause.

I have come to this result with reluctance, after much consideration, and against my first impression ; for the object of the by-law is both salutary and necessary. Had I finally entertained a doubt, I should have felt bound to render such judgment, as would have enabled the defendant, by a bill of exceptions, to obtain the judgment of the supreme court. But all criminal suits in the name and behalf of the commonwealth are defended at the sole risk and charge of the accused party. A judgment against the defendant in this case would throw on him the fine and costs, which he must pay or be committed to prison ; and if he should finally succeed in obtaining a reversal of the judgment in the supreme court, I do not know how he can compel the commonwealth to refund the money, or to indemnify him for the personal injury which he might sustain. I consider him entitled to the benefit of my opinion in his favor, and the verdict must be set aside and the complaint dismissed.¹

¹ 4 W. & M. c. 15 ; 13 Mass. R. 278 ; 1 Roll. 264 ; Com. Dig. tit. By-law E. 2 ; Col. Chart. 195 ; 5 Mass. R. 548 ; Hob. 211 ; 2 Vent. 183 ; 2 Kyd, 110 ; 1 Mass. R. 189 ; 2 Kyd, 98 ; Com. Dig. tit. By-law, C. 7, D. 2.

DECEMBER TERM, 1824.

COMMONWEALTH v. WILLIAM WORCESTER, APPELLANT.

Where a part of a by-law of the town of Boston was read to support an indictment, it was *held*, that the whole of the by-law ought to be put into the case.

Upon the trial of a person on a complaint for having driven his horses and woodcart on a trot, through the streets of Boston, contrary to a by-law of the city, it was *held*, that evidence, to show that the mayor and the city marshal, in various conversations with the defendant and other persons, had said that the drivers of carts might drive at a moderate trot, was inadmissible.

Evidence to show that the defendant had been, for several years, reputed to be a prudent and careful driver, was also excluded.

Evidence to show that, if the drivers of woodcarts should be compelled to drive at a moderate footpace, it would tend to raise the price of wood, and so be prejudicial to the inhabitants of Boston, was also excluded.

The police court of the city of Boston has jurisdiction of a complaint against a person for driving his horses and cart on a trot, through the streets, contrary to a by-law of the city.

The fifth section of the act of 1824, c. 28, which enacts, that in such cases it shall not be necessary to set forth the by-law in the indictment, is not in violation of the sixth article of the bill of rights.

The by-law of the city of Boston, forbidding the driving of horses with wagons, carts, trucks, and sleds attached, faster than at a moderate footpace, is reasonable and for the public good, and the city government had power to enact the same, without the adoption thereof in a town meeting ; and also without the express permission of the legislature.

THIS was an appeal from the judgment of the police court of the city of Boston, rendered on the 18th of November, 1824, upon the complaint of Benjamin Pollard, city marshal. The complaint stated, " that said Worcester, on the 28th day of October, in the city of Boston, did drive two or more certain horses, then and there drawing a certain cart, said Worcester

then and there having the care of the same, in and along Summer street, the same being one of the streets of said city, on a trot, and not at a moderate footpace, against the peace and the form of the by-law of said city made and provided." The case was opened on the 11th of December, when, upon a suggestion that there was a diminution of the record of the police court, and a specification thereof in writing by one of the counsel for the appellant, an order was issued to Thomas Power, the clerk of that court, to return a true and perfect copy of the whole record, and the case was adjourned to the 13th day of the same month; at which time the order was returned by Mr. Power, with a certified copy of the record, as it was originally sent up. No suggestion was further made against the record, and the trial proceeded.

The appellant then moved, that the complaint should be quashed, because, 1. Neither the police court nor this court has jurisdiction of the same. 2. Because no law incorporating and authorizing the city of Boston to make by-laws, nor any by-law of the said city, is fully, plainly, substantially and formally set forth according to the laws and constitution of this commonwealth. 3. Because the said supposed by-law, if any such has been made, is altogether null and void. This motion was overruled, and the counsel for the appellant were informed that a time should be appointed at which they would be fully heard on this motion, and on every other legal exception, which should be taken in the course of the trial. The appellant then filed a plea, in which he challenged the array of the panel of jurors, and upon a demurrer thereto by the county attorney and a joinder, the plea was overruled. The appellant then renewed his challenge to each of the jurors, on the ground that they were interested in the by-law and penalty as inhabitants of this city. These were likewise overruled. The county attorney then offered to read to the jury an extract from the by-law of the town of Boston of May 22d, 1801, certified by S. F. M'Cleary, city clerk, being the whole clause on which the complaint was

founded. But on an objection by the counsel for the appellant, the court decided that the whole of the by-law must be put into the case, although the county attorney need not read more than he chose of the same. It was the right of the counsel for the appellant to read and comment on the whole.

The witnesses were then examined, namely, Henry Gassett, Isaac Vose, and Simeon Dow. The fact that the appellant drove his horses in a woodcart, on a fast trot and not at a moderate footpace, through Summer street, was proved by the testimony of Vose, who was the servant of Mr. Gassett, and was placed by him, on the 28th of October and on several other days, before and after that time, to take notice of those drivers of carts who should violate this by-law. The appellant examined Capt. W. H. Prentice, who testified, that the appellant's team consisted of three horses, that the forward one was a remarkably fast walker, and that he generally walked so fast as to oblige the other horses to follow on a trot.

William Parker opened the case on the part of the appellant. He said that by the adoption of the city charter, all the former by-laws of the town of Boston became *ipso facto* void. 2. That the present by-law was against common right, inasmuch as it restrained persons from driving through the highways at pleasure. 3. That it was not a valid by-law, not being within the objects, on which it was competent for a town to enact by-laws. He then offered to show in evidence various conversations between the mayor of the city of Boston and the city marshal, with several persons, and particularly with the appellant, to prove that the said mayor and marshal had said, that the drivers of carts might drive their horses through the streets of said city at a moderate trot, and that no complaint should be made, or prosecution instituted therefor. This evidence, being objected to by the county attorney, was not admitted. The appellant then offered witnesses to testify, that he had been for several years accustomed to drive carts in the city of Boston, and was reputed and known to be a steady, prudent and careful driver. This

evidence being objected to by the county attorney, was excluded. The appellant then offered to prove by witnesses, that if the drivers of woodcarts should be compelled to drive at a moderate footpace, it would tend to raise the price of wood, and so would be prejudicial to the inhabitants. This evidence being objected to by the county attorney, was likewise excluded.

The appellant then insisted that the by-law had never been enforced since its adoption, and was obsolete. The county attorney then read an ordinance of the city, passed May 2, 1822, by which all the by-laws of the town of Boston, which were in force on the 30th of April, 1822, were declared to be in force in the city of Boston.

Rand closed the case for the appellant. He argued, 1. That this was not one of the prudential affairs of the city, which towns have authority to regulate by private statutes. 2. That the object of the law was to prevent the driving of carriages at such a rate as to endanger the lives and limbs of passengers, that the law did not apply when the streets were empty, and it did not appear, in this case, that any persons were exposed to danger by the manner in which the appellant drove his team. 3. That the legislature have, by the act of 1820, c. 65, (Rev. St. 51,) regulated the driving of carts and carriages through the highways of the commonwealth, which excluded all private regulation. He then considered the evidence in the case.

Austin, for the commonwealth.

THACHER, J. TOWNS are one species of corporation or bodies politic. There are some things, which are said "to be necessarily and inseparably incident to every corporation; and among these is the power to make by-laws or private statutes, for the better government of the corporation," (1 Bl. C. 476) which are binding on their own members. By the general law of this commonwealth, (act of 1785, c. 75, s. 7; Rev. St. c. 15,) the freeholders and inhabitants of each respective town are "empowered to make and agree upon such necessary

rules, orders and by-laws, for the directing, managing and ordering the prudential affairs of such town, as they shall judge most conducive to the peace, welfare and good government thereof, and to annex penalties for the observance of the same, not exceeding thirty shillings for one offence" — provided they be not repugnant to the general laws of the government, and be approved by the court of general sessions. By the charter of this city, the mayor and aldermen and common council may make all needful and salutary by-laws, and may enforce their observance by a penalty not exceeding twenty dollars. The power to make private statutes or by-laws, being thus common to all corporations, it is to be expected, that they will vary according to the circumstances and objects of each. What would be prudent and necessary for the well-being of one, would not be so for another. What would be a discreet by-law for a literary, charitable, or manufacturing corporation, would not be applicable to a town, and what would be a prudent by-law for a populous and commercial city, would be far otherwise for a country village. If the legislature should be called upon to enact the by-laws, which were rendered necessary for the convenience and comfort of each town, there would be no end to its session ; and after all, the business would not be so well done as it now is by the inhabitants in their corporate capacity. I deem it to be wise and safe, to trust this business to the inhabitants of the towns ; because it will very rarely happen that they will voluntarily fetter themselves with unnecessary and inconvenient regulations. It is therefore properly left to the good sense of each town, to make their own by-laws, according to what they shall deem prudent and conducive to their peace, welfare and good order. The limitation to the general power in all the towns is, that their by-laws shall not contravene the general laws of the state. The by-laws of this city are subject to the same restriction, and they may be repealed by the legislature.

The object of the present by-law is, to require the drivers of carts to drive their beasts at a moderate rate or footpace,

through the streets of this city. Such a by-law would be quite applicable to a country village. But in a place like this, full of houses and inhabitants, with narrow and inconvenient streets, crowded with a busy, industrious and active population, all full of life and motion, and quite heedless of danger; a regulation to restrain carts and teams from being driven rapidly through the streets, seems to be necessary, to protect the lives and limbs of men, women and children, and to guard them against the innumerable accidents to which they would be otherwise exposed. The law is also intended to prevent the great noise which arises from driving carts over the pavement of the streets rapidly, to the annoyance both of the sick and the well. I should fail in the duty which I owe to the public, should I not say, that I deem this by-law to be a wise and prudent regulation, and binding on the inhabitants. It is repugnant to no principle of the constitution, nor to any general law of the commonwealth; nor is it in restraint of common right; and although learned and ingenious counsel may suggest doubts and objections, yet we are not to suffer ourselves to be misled by their eloquence. It will be safe to consult and to follow in this case our common sense, which was designed by heaven to guide us on all occasions of duty.

The jury found the appellant guilty.

The case was continued to the next term. The parties were heard in the Law Library on Friday, the 24th of December.

Rand and Parker, for the appellant.

1. Neither the police court nor the municipal court has jurisdiction of this complaint, but the justices court. *King v. Inhabitants of Woburn*, (10 East R. 395); 1 Phillips on Evidence, 60; Hobart, 87; 8 Co. 118, which is cited in 1 Bl. Com. 91;

Hawkes v. The County of Kennebec, (7 Mass. R. 461); *Pearce v. Atwood*, (13 Mass. R. 324.)

2. The complaint is defective in form, because the by-law on which it is founded is not set forth in it at length. The fifth section of the act of 1824, c. 28, which enacts "that it shall be sufficient, in cases of this kind, to set forth in the complaint the offence, fully and plainly, substantially and formally," and declares that it shall not be necessary to set forth the by-law, is in violation of the sixth article of the bill of rights, because it confers on the inhabitants of Boston a "particular and exclusive privilege distinct from those of the community." This act is an addition to the city charter, and is not binding on the inhabitants of Boston, until it has been proposed to their acceptance, and adopted by them in town meeting, as was done in relation to the charter. (Art. 12 of Bill of Rights; 4 Co. 768; Skinner, 350.)

3. The by-law is invalid, because the city council had no right to make it without a special act of the legislature on the subject, which should operate as a grant of power; and because the law itself is unreasonable and contrary to the public good, and will tend to raise the price of wood in the city. 2 Vent. 183; Com. Dig. tit. By-law 67; 2 Kyd, 102; 15 Johns. 358; 2 Cowen, 675; 3 Barn. and Ald. 8; 2 Stra. 1085; 2 Peere Williams, 209; *Stetson v. Kempton*, (13 Mass. R. 272); *Dillingham v. Snow*, (5 Mass. R. 547); *Bangs v. Snow*, (1 Mass. R. 189); 1 Roll. 364; 2 Kyd, 100; *Kirk v. Nowill and another*, (1 Term R. 118); *The Chamberlain of London's Cases* (5 Co. R. 62); *Bridgman's Judgments*, ib. 274-323; Stra. 462-464.

Austin, for the commonwealth.

THACHER, J., on the sixth day of January, 1825, delivered the following opinion. Since the trial of this case in December, the appellant has been fully heard by his counsel, who have, with great learning and fidelity, done their part to assist

the court in coming to a right judgment. A motion has been made to quash the complaint, because neither the police court, nor this court have right to sustain jurisdiction of the same; and because it is essentially defective in form, the by-law on which it is founded not being set forth in it at length. But it being very apparent that this last defect would be cured by the fifth section of the act of 1824, c. 28, the counsel for the appellant have endeavored to show that this section of that act is in violation of the constitution, and so not obligatory. On supposition, however, that the jurisdiction should be sustained, and the complaint adjudged sufficient; it is then denied that the by-law is valid, because the city council had no right to make it, and because the law itself is unreasonable, and contrary to the public good.

1. The right of the police court to sustain jurisdiction of the original complaint, and of this court to sustain the appeal, was settled after full consideration, in the case of the *Commonwealth v. Stephen Bean*, which was similar to the present, at the last October term of this court. (Ante, p. 85.) I was of opinion, at that time, that the jurisdiction of a complaint, founded on a by-law of this city, whether in form of a civil action, or of a criminal complaint, does in fact belong to the justices of the police court; inasmuch as by the act of 1821, c. 109, no process can legally be served on a defendant, where the cause of action arises in this city, which should be made returnable before a justice of the peace in Chelsea. The opinion, which I expressed at that time, I have not had reason to change. It has been argued, however, that the jurisdiction of this case belongs, under the act of 1824, c. 28, to the justices court; because, by the fourth section of that act, all forfeitures and penalties accruing under by-laws relating to the health of the city, must be sued for in that court. That section refers to the recovery of fines, accruing under the act of 1816, c. 44, (Rev. St. c. 21,) establishing the board of health in the town of Boston, or under ordinances of the city council, which should be

adopted, pursuant to the seventeenth section of the act of 1821, c. 119, (the city charter,) which transferred to them the powers of the board of health. But as the present by-law regards the safety of the highways and streets of the city, and cannot with propriety be considered as relating to its health, the complaint was, I think, correctly instituted in the police court, which, by its expeditious and summary proceedings, is well calculated to enforce the observance of our municipal regulations.

2. The second ground, for the motion to quash the complaint, relates to its sufficiency in point of form. Now by the fifth section of the act of 1824, c. 28, it is enacted "that it shall be sufficient, in cases of this kind, to set forth in the complaint, the offence fully and plainly, substantially and formally ;" and it is declared, "it shall not be necessary to set forth the by-law." By this I understand, that the act, in which the offence consists, shall be plainly and sufficiently described, so that the party accused may know with certainty, from the complaint itself, the offence which he is called upon to answer. The by-law is part of the evidence, which is to be shown at the trial, and the court is required to take notice of it, as of any general law. And thus, prosecutions of this kind are put on the same ground with indictments, founded on any general law of the state. If this is a correct view of the meaning of that section, there is no doubt that the present complaint is substantially correct, because the act complained of is fully and accurately described. It has been argued, however, by the counsel for the appellant, that this section of the act of 1824, c. 28, is in violation of the sixth article of the bill of rights, because it confers on the inhabitants of Boston, "a particular and exclusive privilege." But this act does not suspend the general laws of the commonwealth in favor of an individual, as was done in the case of *Holden v. James*, (11 Mass. 396,) contrary to the twelfth article of the bill of rights ; nor does it make that act to be criminal in one individual, or in a particular class of individuals, which would be innocent in all other citizens. It con-

cerns the public justice, and provides an expeditious and easy mode of instituting certain prosecutions, which must be frequent here, but which will rarely occur in any other town of the state. In this I see a provident attention, on the part of the legislature, to the wants of this portion of the commonwealth, in the administration of the public justice, and not the grant of an obnoxious privilege.

The counsel for the appellant have further contended, that this act is an addition to the charter, and that it cannot bind the inhabitants of Boston, until it has been proposed to their acceptance, and adopted by them in town meeting, as was done in relation to that instrument. Now, though it may be true, that no essential change in the form or features of our present city government can be lawfully made, even by an act of the legislature, without the express assent of the inhabitants ; yet such restraint does not extend to the enacting of laws merely affecting legal remedies, or the forms of proceeding in judicial cases. It is the prerogative of the legislature to order these things ; and it would be against their duty, to restrict themselves by compact or otherwise, from making any provisions in relation to them, which the public good should in their wisdom be thought to require.

3. Having satisfied myself, that this court is bound to sustain the appeal in this case, and that the complaint is sufficient in form, it remains to consider the by-law ; and I freely admit, that if it is on a subject, on which the inhabitants had no rights in their corporate capacity to legislate ; if the by-law in its provisions transcends their powers, or if it contravenes any general law of the commonwealth, it must be pronounced invalid. In construing any law, we must consider its design and practical tendency, its reasonableness and necessity. A law is not to be pronounced unwise, nor condemned as unreasonable, because it occasions some evil. All general laws are liable to this objection, and yet without general laws society could not be governed. Whenever a law is found to be a dead letter, or pro-

ductive of little or no good, or to cause much evil, it well deserves the attention of its makers. But until it is repealed, it is binding on the subjects. This by-law relates to the highways and streets of this city, the convenience and safety of which are among the primary objects of municipal government. It does not propose to shut them up, or to prohibit their use, in a lawful way, to any citizen. This would be unreasonable, against common right, and in violation of the general laws of the land. It declares, "that all carters, and all other persons, having the care of any wagon, cart, truck, or sled, passing through, or in the streets of the town of Boston, shall drive their beast or beasts, at a moderate footpace, and shall not suffer them to go in a gallop or trot." This law is on a subject, of which the city was the best judge. It is not to be presumed that the inhabitants would, in their corporate capacity, and with deliberation, enact a private statute for their own government, which was not called for by some real or supposed necessity. They would not wantonly forge chains for themselves. In a city like this, full of houses and inhabitants, with narrow and inconvenient streets, crowded with a busy, active, and industrious population, all full of life and motion, and quite heedless of danger, a regulation to restrain carts and carriages from being driven rapidly through the streets, seems to be necessary, to protect individuals from the innumerable accidents to which they would otherwise be exposed. Entertaining this opinion of the object and necessity of this by-law, I should fail in my duty to the public did I not say, that I deem it to be a wise and prudent regulation. It is argued, that to compel the drivers of woodcarts to pass through the streets at a moderate footpace, will greatly delay them in their business, and have the tendency to raise the price of wood. But this increase in price will fall on the inhabitants, who consume it, and not on the dealers in the article.

The counsel for the appellant have referred to a multitude of special acts of the legislature, which have been passed at dif-

ferent periods, on various subjects, relating to the wants and convenience of this city; and hence have argued, that the city could not enact this by-law without a special act of the legislature on the subject, which should operate as a grant of power. But in most of those cases, it will be found on examination, that money was to be raised to effect their objects, which could not be done without the consent of the legislature; as in the acts relating to the public health, to paving the streets, to lighting the streets with lamps, to providing fire engines, and the appointment and privileges of firemen, and to establishing a city watch. In some cases, greater restrictions were required than could be obtained from a by-law, as in those relating to livery stables, and to building with brick and other incombustible materials; and in other cases, a by-law would be wholly inoperative; as in the act authorizing the selectmen of Boston to regulate the standing of carts in the streets. Any regulation of the city on this subject, would be binding on its own inhabitants, but not on the inhabitants of other towns, bringing hay, wood, cider, and other articles to our market; and therefore the consent of the legislature was necessary, to enforce regulations made to operate on strangers. The inhabitants of each town in this commonwealth are authorized (by the act of 1785, c. 75, s. 7,) to make by-laws for "directing, managing, and ordering their prudential affairs," and to exercise their own discretion, as to what they may "judge most conducive to their peace, welfare, and good government." By the term prudential is meant, "whatever is eligible on principles of prudence." So that it is not left to custom, or to the example of former times; but by the positive declaration of the law of this commonwealth, that the inhabitants of each town may pass any by-laws, which they may deem wise and salutary; and these by-laws will be undoubtedly binding on themselves, if they have the approbation of the courts of sessions, and do not contravene the general laws of the state.

Commonwealth v. Hyde and others.

After hearing and considering attentively all that has been said on the subject, I am of opinion, that the by-law, on which this complaint is founded, is a prudent regulation, and binding on the inhabitants of this city. The judgment of the police court is affirmed, with additional costs of prosecution.¹

JULY TERM, 1825.

COMMONWEALTH v. EPHRAIM HYDE AND OTHERS.

The police court of the city of Boston has no jurisdiction of a complaint for an assault and battery upon a constable, and rescuing from his keeping a prisoner in lawful custody; and a conviction, upon such complaint, in that court, is not a bar to a prosecution by indictment.

EPHRAIM HYDE, Elihu Phelps, Edward Griffin, Mark Spinney, and Alfred Spear, were indicted, first, for an assault and battery committed upon Jason Braman, a constable of the city of Boston, on the 25th of May, 1825, said Braman being at the time in the actual discharge of the duties of his said office: second, for a riotous assembling together to commit an unlawful act, and for committing an assault upon the body of Jason Braman, a constable in the exercise of his said office. Hyde pleaded specially to the assault and battery a former conviction before the police court, and to the residue of the indictment,

¹ This case was carried to the supreme judicial court, by a writ of certiorari, and fully argued. At the term of that court in Suffolk, March, A. D. 1826, the opinion was pronounced by Wilde, J., in which all the foregoing objections were overruled, and the by-law established. But on a doubt as to the sufficiency of the complaint, in omitting to conclude "against the form of the statute," the court took further time, and ordered an argument to be had by counsel on that point, and at the term in March, 1827, the complaint was quashed for that defect. *Commonwealth v. Worcester*, (3 Pick. 462); *Same v. Gay*, (5 lb. 44.)

not guilty. The four other prisoners pleaded not guilty. The county attorney demanded oyer of the record of the former conviction, which was granted, and demurred to Hyde's plea. The record sets forth a complaint against Hyde, for an assault and battery on Braman, in his office as constable, and for rescuing a prisoner whom he had in lawful custody from his keeping. Upon trial before Benjamin Whitman, the senior justice of the police court, he was found guilty, and sentenced to pay a fine of three dollars and thirty-three cents, and costs of prosecution.

THACHER, J. The act of 1821, c. 109, which establishes the police court, provides that it shall be held daily by some one of the justices, "to take cognizance of all crimes, offences and misdemeanors, whereof justices of the peace may take cognizance by law" — "and the court shall hear and determine all suits, complaints and prosecutions, as is provided for the exercise of the powers and authority which are vested in justices of the peace, reserving the right of appeal." All courts must strictly keep themselves within the limits of their jurisdiction. If they exceed those limits, not only are their acts void, but the party injured by an unlawful exercise of authority would be entitled to redress. If a judge should exceed his powers by committing a person to jail, when he could only inflict a fine, or in a case which was beyond his jurisdiction, the injured party would find immediate relief under the writ of *habeas corpus*, and an action would lie for the false imprisonment. And this is necessary for the protection of the liberty of the citizen, and it is a salutary caution for all who are concerned in the exercise of power, to be governed by the rules of law. And though great lenity is due to a well-meaning magistrate, who commits an undesigned mistake in his practice, yet the law would inflict a severe retribution on one who should be guilty of a malicious or tyrannical abuse of his office.

The power of justices of the peace in criminal matters is limited by express statute. By the act of 1783, c. 51, (Rev.

Commonwealth v. Hyde and others.

St. c. 85,) justices have power within their county "to punish by such fine as is by the statute law of the commonwealth provided, all assaults and batteries that are not of a high and aggravated nature, and to cause to be stayed and arrested all affrayers, rioters, disturbers and breakers of the peace, and to bind them by recognizance to appear at the next supreme judicial court, or court of general sessions of the peace, to be held within or for the same county, at their discretion. And also to require such persons to find sureties for their keeping the peace, and being of good behavior, until the sitting of the court, and to commit those who refuse so to recognize." Those concerned in affrays and riots must be sent to a higher tribunal, and their offences may not be finally adjudicated on by a justice of the peace. And so likewise must all those who are guilty of assaults and batteries of a high and aggravated nature. A simple assault and battery committed by one person on another is within the jurisdiction of a justice. But where there are circumstances of aggravation, as where the assault is committed on a magistrate, a sheriff or other officer in the actual administration of his office, or where the assault is committed with an intention to commit a felony or other high crime, or where the battery is attended with such circumstances either of personal violence or insult as to warrant the court, in its sound discretion, to inflict a higher punishment on the offender than a fine of twenty shillings; in all these cases, the jurisdiction exceeds the power of a justice of the peace. A judgment rendered in such case by a justice would not be a bar to a prosecution by indictment, for if it would, enormous crimes might pass without an adequate punishment. The defendant's plea is therefore overruled.

The riots arose from the circumstance of Braman having arrested a man upon the common, on the day of the general election, the individual so arrested having been guilty of a breach of the peace at the time. Braman was stationed there with other constables, by order of the mayor, for the purpose

Commonwealth v. Hyde and others.

of taking care of the common, and preserving the peace, having no special warrant for the occasion. It was denied, by the prisoner's counsel, that Braman was at the time in the actual exercise of the duties of his office, and they contended that he had no right to arrest the individual without a special authority for the purpose.

S. D. Parker, and D. A. Simmons, for the prisoners.

Austin, for the commonwealth.

THACHER, J., instructed the jury, that it was the right and duty of the mayor and aldermen to cause the constables to attend upon the common on holidays, for the purpose of keeping order, and that it was proper that these officers should be employed at the theatre and the circus, and in other places, where large collections of persons were expected to be present. That "constables had great original and inherent authority with regard to arrests. A constable may without warrant arrest any one for a breach of the peace. And in case of felony actually committed, or a dangerous wounding, whereby felony is like to ensue, he may, upon probable suspicion, arrest the felon." (4 Bl. Com. 292.)

The jury continued together until a late hour of the evening, and the next morning returned a verdict, that Hyde, Phelps and Spear were not guilty, and that Griffin and Spinney were guilty of the riot, but not guilty of the assault.

All the prisoners were thereupon discharged, as by law, to constitute a riot, three persons must be actually concerned, and as the indictments had charged the prisoners only as being guilty of the offence, and only two of them had been convicted, no judgment could be entered upon the verdict against Griffin and Spear.¹

¹ 1 Vent. 250; *Rex v. Heaps*, (Salk. 594); 2 Chitty C. L. 488, n. (f); 2 Camp. 367.

AUGUST TERM, 1825.

COMMONWEALTH v. HOSEA SARGENT AND SEVEN OTHERS.

Where a trial had been commenced, and it was then discovered that the indictment was not signed by the foreman of the grand jury, it was *held*, that no further proceedings could be had on it, (although the counsel were willing to proceed.)

Where a trial had been commenced, and it was then discovered that the indictment was not signed by the foreman of the grand jury, and the indictment was withdrawn from the jury, it was *held*, that they could not find another bill against the same persons, for the same offence, without the authority of the court.

THE prisoners were indicted for a riot at common law, on the 26th of July last. They severally pleaded not guilty. A jury was empaneled and sworn to try the issue, and some progress was made in the trial. But it was discovered by the court, that the indictment was not signed by the foreman of the grand jury. Upon suggesting the defect, the county attorney intimated his readiness to proceed with the trial, insisting that the indictment, having been delivered to the court by the grand jury and filed, was sufficient, notwithstanding the omission of the foreman's signature. The counsel for the prisoners intimated their willingness to proceed with the trial, but the judge observed to them that the bill was not verified according to law, and that it might have been returned into court by mistake. The clerk was then ordered to take the indictment from the jury, and to inform the prisoners there would be no further proceedings on it.¹ The prisoners' counsel then moved that the prisoners should be discharged from their recognizance. But the judge stated that this could not be claimed until the last day of the court, and denied the motion. The grand jury were

¹ See Starkie on Criminal Pleading, c. 27, on the right of the court to quash.

then, on the motion of the county attorney, ordered to be summoned forthwith into court. They accordingly attended in the course of the same forenoon, and on being called, they offered a new presentment to the court against the prisoners. It seems that they had previously been together and had agreed to find a new bill. But the court refused to receive it, because they could not assemble themselves voluntarily, and without the authority of the court, and agree to find a bill against any person. They were therefore sent to their usual place of consultation, and soon after returned into court and presented a bill against the same individuals, who were afterwards put on trial, four of whom were convicted of the offence and received the sentence of the law.

S. L. Knapp, R. Fletcher, E. Morse and D. A. Simmons, for the prisoners.

Austin, for the commonwealth.

Prior to the passing of sentence *Knapp* objected, for the cause that the indictment in the former instance had been withdrawn from the jury without their consent, and that they could not lawfully be tried again for the same offence.

THACHER, J. There is a difference in the case of an indictment which was in due form and properly verified, but which is not supported by evidence. The bill in such case cannot be taken away from the jury, and the prisoner is entitled to a verdict. In this case, the indictment wants the usual evidence that it was found by the jury, and therefore can only be regarded as waste paper.¹

¹ *Rez v. Tremearne*, (Ry. & M. 147); *Rez v. Deacon*, (ib. 27)

AUGUST TERM, 1825.

COMMONWEALTH v. CHARLES JENKINS AND OTHERS.

On the trial of persons indicted for a riot, a count of the indictment setting forth that they with others riotously assembled, to the disturbance of the public peace, and then riotously began to pull down a certain dwelling-house, was *held* to be sufficient, although it did not state the unlawful act which they assembled to commit.

Where, after a jury had retired to consult on their verdict, they sent a note in writing to the judge, in the absence of parties and counsel, requesting advice on certain points in the case, and the judge returned the writing without reply, and directed the officer to hand a volume of reports to the foreman, and to request him to read a part of a decision, to the effect that a jury in such circumstances could not communicate with the judge except in open court; it was *held* that this was not a sufficient ground for a new trial.

Where, in the trial of a case in which the jury were to decide upon both law and fact, the officer in attendance delivered to them, at their request, without application to the court, after they had retired to consult upon a verdict, a volume of the laws of the commonwealth, containing the act upon which the indictment was founded, which act had been commented on by the counsel and by the court, and which volume the court would have given them leave to take with them, if requested; it was *held*, that this was not a sufficient ground for a new trial.

Where, after a jury had retired under the attendance of an officer, and before the court adjourned another officer was sworn to attend upon them, and after the adjournment a third was sworn by the clerk to supply the place of the second for a few minutes; it was *held*, that this was according to usage, and no ground for a new trial.

THE first count in the indictment set forth that Charles Jenkins, Thomas Jones, Ezekiel De Coster, Barney Cook, Benjamin H. Boynton, Andrew Horton, Jonas Harrington, and Hosea Sargent, with fifty other persons, whose names were unknown to the grand jury, riotously assembled together on the 27th of July, to the disturbance of the public peace, and being so as-

sembled, riotously began to pull down and demolish a certain building, before occupied as a dwelling-house, against the peace of the commonwealth. In a second count they were charged with riotously assembling on the 27th of July, to disturb the public peace, and being so assembled, with making great noises, riot, tumult and disturbance, for the space of two hours and more, to the great terror and disturbance of all the good citizens.

To prove the riot, Josiah Quincy, the mayor of the city, testified, that disturbances had occurred at the north part of the city on the evening of the 25th and 26th of July, that information was brought to him that they were to be renewed on the evening of the 27th, and that he had reason to believe that it was intended to pull down and destroy all houses of bad fame in the city. He convened the aldermen on the occasion, and was expressly authorized to take all such measures, as the exigence demanded, to quell the disturbance. The peace officers, constables and watch, were ordered to attend, and an efficient body of citizens, attached to order, volunteered to be in readiness to assist, provided they should be wanted. The mob assembled, and he had notice that they were near to a noted bawdy house at the north end, and threatened its destruction. The knowledge of their determination was known before, and the inhabitants had removed from it with their effects. The mayor went to the spot soon after nine o'clock in the evening, accompanied with only two constables, was immediately admitted into the centre, and was permitted to address the multitude. He seized the opportunity to urge them to desist from their unlawful purpose, and to retire peaceably to their dwellings. Very soon after he had finished his address, one of the multitude made a speech to them in reply to it, complaining that the law was full of delay, that it was not meted out equally, and that bad houses and their inhabitants were not duly prosecuted, and mentioned a case of his own. This speech was received with shouts, and stones immediately began

Commonwealth v. Jenkins and others.

to be thrown. The mayor then commanded silence, and made the proclamation for the persons assembled to disperse, and peaceably to depart to their habitations, or to their lawful business, as directed by the act of 1786, c. 38. He said that many hundreds were present, perhaps a thousand or more, that they appeared to be very violent, and that they began to crowd upon him, and therefore he commanded the attendance of the constables and watchmen, and went himself for the efficient body of volunteers, who were in readiness, and in the course of an hour they were all upon the spot and in the midst of the tumult. He had cautioned these volunteers not to use any violence, and only to give countenance and aid to the civil authority there. By these measures the threatening evil was checked, and in the course of an hour or two afterwards quiet was restored, and the multitude dispersed. The evidence of the mayor as to the existence of the riot, and to all other material points, was confirmed by all the witnesses who were examined both for the commonwealth and for the defendants. The evidence was continued to a great length, upwards of sixty witnesses being examined in the course of the trial. It appeared that the house was assaulted with stones, and that some of the shutters and window-sashes were destroyed. The quiet people in the vicinity were in great terror, and closed their houses, and it was evident that it was the intention of the rioters to pull down the building, and all was done with tumult and violence. The noise was heard to a great distance, and drew multitudes to the scene.

E. Moore and Z. G. Whitman, for the defendants.

Austin, for the commonwealth.

THACHER, J., then charged the jury as follows. In the course of the trial, much has been said of the nature of this offence, and positions have been laid down by the counsel, on which you may expect some advice from the court. It is proper and commendable for the counsel in a cause to exer-

cise all their learning and ingenuity in behalf of their clients. As your verdict is compounded of law and fact, and as you are bound to pronounce on both, I have not thought it proper to deny to the counsel the right of addressing you on both, especially as the argument on the law may be considered as in fact addressed to the court. This, however, makes it my duty to state to you with simplicity and candor, the principles of law, which I consider applicable to the case, and to leave it to you to apply them to the facts in evidence, and to frame such verdict as you may be able to justify to your consciences and to your country. And first, as to the sufficiency of the indictment. It contains two counts, or a description of the offence in two modes. The first alleges, that the defendants, with fifty others, on the 27th of July, did riotously assemble together to the disturbance of the public peace, and being so assembled, riotously began to pull down and demolish a certain building, before occupied as a dwelling-house, against the peace of the commonwealth. In the second count, the grand jury charge, that the defendants with fifty others did, on the said 27th of July, riotously assemble together to disturb the public peace, and being so assembled, that they made great noises, riot, tumult and disturbance, for the space of two hours and more, to the great terror and disturbance of all the good citizens. The unlawful intention of the rioters, in both instances, is the disturbance of the peace; the unlawful act alleged in one is the destruction of a dwelling-house, and in the other, the terrifying of the citizens by great noises from a tumultuous multitude. The act in each case is an unlawful one, and both counts describe a riot, at common law, and not against any particular statute of the commonwealth. A riot is a tumultuous disturbance of the peace, by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them, and afterwards putting their design into execution in a terrific and violent manner, whether the object in question be lawful or oth-

Commonwealth v. Jenkins and others.

erwise. Concert is essential, but it may be inferred from actions or from words. The intent must be to stand by, and to assist each other; but it is not incumbent that the government should give direct evidence of this previous concert; that may be inferred from the conduct of the parties at the time. They may act in concert, although they may be strangers to each other, and may not have had a previous conference or understanding on the subject. The object must be executed with circumstances of violence, calculated to inspire well-grounded fears in reasonable minds. It was said by Lord Mansfield, in one case, "If people endeavor to effect an object by tumult and disorder, they are guilty of a riot. It is not necessary to constitute the crime that personal violence should have been committed, or that a house should have been pulled in pieces. If there be violence and tumult, it has been generally holden not to make any difference, whether the act intended to be done by the persons assembled, be of itself lawful or unlawful." The object will not justify the violence. In the eye of the law it is not material, whether the object is to pull down a bawdy house or the house of a virtuous citizen. If a man may by his own authority pull down a bawdy house, how soon would his passions hurry him on to destroy other houses, the residence of domestic peace, innocence and industry? He makes his own judgment and passions the rule to try, condemn and execute at the same moment. If this may be done, of what use is government and all its costly apparatus of courts and officers of justice? It is the duty of all good citizens to bring offenders to justice. If a man keeps a bawdy house, he may be indicted for it. If individuals indulge themselves in habits of prostitution and debauchery, they may be apprehended and punished as offenders. The law is strong enough for all these things, and there is no need of violence to effect them. By peaceable means every nuisance may be abated. But when we depart from the straight legal course, we forfeit the protection of the whole social system. While we seek a right object in a lawful

way, all the strength of society is pledged for our support ; but the moment we seek even a right object in an illegal manner, the whole strength of society becomes arrayed against us. Another principle of law is applicable to this case. If a person, seeing others actually engaged in a riot, join himself to them, and assist them therein, he is as much a rioter as if he had at first assembled with them for the same purpose. It is not necessary to prove that he was the original author and instigator of the riot. If any person encourages or promotes or takes part in a riot, whether by words, signs or gestures, he is himself to be considered a rioter, and is liable at the time to be arrested by any peace officer for a breach of the peace. And in this offence, all concerned are deemed principal offenders. And it is said by Lord Mansfield, in a case of great interest, and after full deliberation, that "the mere presence may be an aiding. The number of persons present and inciting deters others from opposing ; though the persons present and inciting may not do any particular and personal act themselves."

Having stated these preliminary principles for your assistance, you will inquire, first, whether any persons were guilty of a riot in the city on the 27th of July last, as stated in the indictment, and, secondly, whether the defendants or any of them have been proved to you to have been guilty actors in that riot. First. To prove the existence and extent of the riot, you have the testimony of the mayor of the city. You are to recollect that the mayor of the city is placed at the head of its executive government, a place of great responsibility. By the terms of the charter it is expressly made his duty, to be vigilant and active at all times, in causing the laws for the government of the city to be duly executed and put in force, and to see that every subordinate officer of it does his duty. On the present occasion, he has come forward and stated to you all that he did, and all the motives of his conduct, in putting an effectual and immediate stop to what threatened to be a dangerous tumult.

The judge then referred to the testimony of the witnesses as

Commonwealth v. Jenkins and others.

applied to each of the defendants, and instructed the jury to consider the case of each as though he were separately on trial, and to collect and compare the testimony with all candor to the accused and all fidelity to the public justice. The jury continued in conference till late in the evening of the same day, and returned into court on the following morning with their verdict, that Charles Jenkins, Thomas Jones, Barney Cook, Benjamin H. Boynton and Jonas Harrington were not guilty; and that Ezekiel De Coster, Andrew Horton and Hosea Sargent were guilty.¹

The counsel afterwards submitted a motion in arrest of judgment, and for a new trial, on which they were heard on the 22d of August, to wit; in arrest of judgment, because the indictment in the cause did not state the unlawful act which the defendants assembled to commit, and because said indictment is insufficient in law to charge the defendants with a riot or any other offence; and for a new trial, — 1. Because the judge, after the indictment had been committed to the jury, and after they had been adjourned, and before the jury had agreed upon a verdict, and when they were in the jury room, had communication with said jury, and did send to them, for their instruction, guide and information in the cause aforesaid, a law book, namely, the first volume of Pickering's Reports, and without the knowledge or consent of said defendants or their counsel.

2. Because the officer who attended said jury, did, at the request of said jury or some one or more of them, before they had agreed upon a verdict, and without the knowledge or consent of said defendants or their counsel, obtain and commit, or did allow to be obtained and committed to said jury then sitting in the jury room, one or more books for their information, guide and instruction in the cause committed to them as aforesaid. 3. Because one Isaac Spear, an officer who had been duly sworn to keep said jury, did leave said jury without any

¹ The trial continued from Wednesday, the 10th, to Friday, the 12th of August at noon, and the verdict was returned into court on Saturday, the 13th.

officer legally sworn and authorized to take charge of them, and was absent from said jury a long space of time, to wit, one hour.

4. Because, after the cause and indictment had been committed to the jury, in the absence of said jury, of the defendants and their counsel, one George Reed, a constable, was sworn to take charge of the same jury, and did afterwards take charge of the said jury, to whom had been committed the said cause, for the space of one hour. 5. Because one or more constables were allowed to take charge of and keep said jury, who had not been legally sworn for that purpose.

Z. G. Whitman, counsel for Cook.

E. Morse, counsel for Sargent and Horton.

The judge, after the arguments of the counsel on the foregoing motions, delivered his opinion on the 24th of August, to the following effect: — I have deemed it my duty to investigate with care the motion, which the counsel for the defendants have made in arrest of judgment, and for a new trial to be granted to them in the case, feeling anxious for the pure administration of justice in this court, and knowing that I cannot render better service to the public, than by taking care that equal and exact justice be done to each individual who may be brought here to answer for any alleged offence. The defendants rely on the insufficiency of the indictment to arrest the judgment, and they allege that it does not state the unlawful act which the defendants assembled to commit, as it ought to have done. The jury have found both of the counts to be true, and therefore if either is good, it will authorize a judgment to be rendered on the verdict. It is otherwise in a civil action. If one of several counts in the declaration be insufficient, and judgment be entered generally, it would be error, and the judgment might for that cause be vacated. I find that the first count contains the charge against the defendants, that they with fifty others, riotously assembled to the disturbance of the public peace, and being so assembled, that they riotously began to pull down and demolish

Commonwealth v. Jenkins and others.

a certain dwelling-house in the city. The offence charged in this count follows with exactness the form of the indictment in the case of *Rex v. Royce*, (4 Burrow, 2073,) in which the offence is charged to have been done feloniously and against the statute, 1 Geo. I. st. 2, c. 5. Very eminent counsel were concerned in that case, and the points connected with it were argued, at several times, with ability, before the King's Bench, and finally the opinion of the whole court was pronounced by Lord Mansfield, against the defendant, with his usual learning. It would be too much to say, that that which was declared to be a felony by that statute, and punishable capitally, was not a misdemeanor at common law. To assemble in a riotous manner, and to pull down riotously and with force and arms, or to begin to pull down with force and violence a dwelling-house, is an offence against the state. It would be a reflection on the government, if such an act were not considered as atrocious, and punishable with severity. But the counsel rely on the case of *Regina v. Stubbs*, (2 Lord Raym. 1210.) In that case, the indictment charged that they assembled riotously to perpetrate *aliquid illicitum*, something unlawful, and being so assembled, that they cut down a certain oak tree. In addition to its bad Latin, the counsel for the defendants objected, that the indictment ought to be quashed, because it did not show the unlawful act which the defendants assembled to do, and because, although it charged that they cut down an oak tree, it did not appear that any oak tree was there growing. And the court agreed that the unlawful act was not sufficiently shown, and quashed the indictment, because they said they would not encourage such ill-drawn indictments. In the present case, the grand jury charge that the defendants riotously assembled to the disturbance of the public peace, which is of itself an unlawful act. And it is undoubtedly true, as was argued in the case before cited from Lord Raymond, that if a number of individuals should assemble to do one unlawful act, and should do another, it would still be a riot. The judge fur-

ther remarked, that he had not himself considered that there was an essential defect in the second count of the indictment, though if it stood alone, he should feel less confidence on the subject than he did in relation to the first count. For these reasons the judgment ought not to be arrested.

Various causes are assigned why a new trial should be granted ; not for anything which occurred at the trial in court, but for errors and miscarriages, which happened, as is alleged, after the case was committed to the jury, and prior to their return into court with a verdict. It is the duty of the court to take notice of the miscarriages of juries, and to grant new trials upon them. For if a jury, through ignorance, partiality or mistake among themselves, should neglect the office of judgment, and decide by chance or other unlawful manner, the verdict must be set aside ; for the parties are entitled to a legal verdict on the matter in issue, according to the evidence at the trial. " But courts do not interfere for the purpose of granting new trials, but in order to remedy some manifest abuse, or to correct some manifest error in law or fact." (1 Starkie's Law of Evidence, 438.) 1. The first cause assigned for a new trial is because the judge had a communication with the jury, in the absence of the parties and of the counsel, before they had agreed upon a verdict, and when they were in the jury room, and sent to them, for their instruction, guide and information in the cause, the published volume of Pickering's Reports. The fact was, that after the jury had retired to consult on their verdict, and the court had adjourned, they sent to the judge a note in writing, requesting advice on two points relating to the case. He returned to them the paper, without any reply to the questions, and directed the officer to request the foreman of the jury to read to them the following sentence from 1 Pick. 342, in the opinion of the supreme judicial court, in the case of *Sargent v. Roberts*, which was delivered by Parker, C. J., " that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the

charge of the judge, unless in open court, and where practicable, in presence of the counsel in the cause." By a subsequent decision of that court on the subject, the communication intended to be interdicted must relate to the cause. Now if I could perceive that this was calculated for the instruction of the jury in the cause, I should feel bound to set aside the verdict ; but applying to the fact my plain understanding and common sense, I cannot perceive that it has any tendency to affect their verdict either for or against the defendants. It would, I think, be unreasonable to say, that if the jury should send to inform the judge that they could not agree upon their verdict, that they wanted refreshment, or other such message, which was not connected with the merits of the case, or with the claims of the parties, that it was an unlawful communication ; and much more unreasonable would it be, in my apprehension, to pretend that there was such a communication, when there was an express refusal to have any, and a reason assigned for it, that it had been settled by the highest judicial tribunal, that such communication would be illegal.

2. The second ground for a new trial is, that the officer who had charge of the jury before they had agreed on their verdict, and without the knowledge or consent of the defendants, did deliver to them one or more books for their information, guide and instruction in the cause. From the evidence shown in support of this ground, it appears that the jury called for the volume of the laws of the commonwealth which contained the riot act, which the officer delivered to them, and Mr. Simmons, one of the jury, testified, that after reading the act, his doubts on certain points were removed, and that he agreed with his fellows on a verdict. This act was read at the trial, and commented on by one of the counsel for the defendants, and the judge had instructed the jury in certain points growing out of it. And the question which arises on those facts is, whether it is misconduct in the jury to read a statute by themselves, which was thus read and commented on during the trial in court.

Commonwealth v. Jenkins and others.

Had they asked leave of the court to take it with them, their request would not have been denied. Because, being bound to decide at their discretion, by a general verdict, both the law and the fact involved in the issue, (Act of 1807, c. 140, s. 15,) to refuse to permit them to take to their consultation the highest evidence of the law, would be to refuse to them the means of forming a discreet judgment. As a general rule, the officer attending a jury may not deliver to them, nor suffer any other person to deliver to them, any book or document, or suffer any communication to take place with them, without the permission of the court. But if an officer should deliver to the jury any book or paper, which the court would have permitted them to take away, it does not, according to the authorities, vitiate the verdict, although it may subject the officer to animadversion. The reading of such book or paper by the jury does not make their verdict a false verdict, for it was wanted by them to enable them to make it a true one. In the case of *Vicary v. Farthing*, (Cro. Eliz. 411,) the solicitor of the plaintiff came to the jury and delivered to them a church book, which had been given to them in evidence before at the bar, and they found for the plaintiff. Three of the judges were of opinion that this should not avoid the verdict. But one judge being of a contrary opinion, the case was adjourned to the next term, when it was finally adjudged for the plaintiff. And a distinction was made between the case of a witness sworn at the trial being reexamined privily by the jury, and that of the delivery to them privily of a writing already given in evidence, since the latter could not be altered. But if the plaintiff, or any for him, after evidence given, and the jury have departed from the bar, deliver any letter from the plaintiff to any of the jury, concerning the matter in issue, or any evidence, or any scroll, touching the matter in issue which was not given in evidence, it shall avoid the verdict, if it be found for the plaintiff, but not if it be found for the defendant, *et sic e converso*. If the jury should privily possess themselves of evidence not produced by the parties openly

in court, it would be a sufficient reason for granting a new trial. If the jury received written evidence, after they had gone from the bar to consider of their verdict, whether communicated by one of the parties or not, it is good reason to avoid the verdict, and for a new trial. Considering these principles to be well established, both by ancient authority and modern assent, and applying them to the case, it seems that the jury, by merely possessing themselves of an act of the commonwealth, which had been read and commented on at the trial, is not a case of misconduct on their part to avoid their verdict. See Grant's Summary or New Trials, 53 - 68, in which the cases are cited. See *King v. Burdett*, (Salk. 645.)

The third cause which is assigned for a new trial is, that the officer Spear, who was first sworn to take care of the jury, left them for the space of an hour. The fourth, that George Reed, another officer, was sworn to take charge of the jury in the absence of the jury, and of the defendants and of their counsel, and did take charge of the jury for the space of one hour; and fifth, because one officer took the charge of the jury, who had not been legally sworn for that purpose. After the jury had retired from court with Spear, an officer who had been sworn to attend upon the jury, and before the court adjourned, another officer, Reed, was sworn in court to attend upon the jury, and after the court was adjourned, the clerk swore Thomas Holden, a constable, to the same service. It was found, that the jury were not likely to agree soon, and that one constable would not be sufficient. The jury are to be kept by themselves, and not permitted to speak to any one, until they have agreed upon their verdict. And it is apparent that more than one officer may be required for this service. Nothing has been done in this case which has not been heretofore usual in this court, nor do I find, on inquiry, that the practice is peculiar to this court. In the supreme judicial court and court of common pleas, an officer is sworn, at the commencement of the term, to take charge of juries in all civil cases, and under the usage offi-

cers are permitted to consult their convenience, and to accommodate each other. I do not see reason for greater caution in criminal cases, though it is usual here to swear an officer in each case. The two officers sworn to the duty in court, had the charge of the jury during the whole consultation, except during two or three minutes, when Mr. Reed says he was obliged to retire for a necessary occasion, and he left them in the charge of Holden. The officers, while they had the jury in keeping, had leave of the judge to give them needful refreshment, which, on inquiry, does not appear to have exceeded the bounds of temperance. This is according to the humane and reasonable practice of modern courts, both here and in England. For the ancient severity in this respect has yielded to a more rational mode of treating juries. They are not to be compelled by hunger and thirst to agree upon a verdict. And as food taken in moderation, according to the wants of our nature, serves to enlighten the eyes as well as to strengthen the body, the jury were allowed in this instance needful sustenance and refreshment, so that their verdict might be the fruit of vigorous minds in search of truth, and not the result of a feeble investigation by men whose bodies were exhausted by abstinence, and who were compelled by the mere necessity of nature, to unite in a result. Now it is not shown or surmised in this case, that the jury separated until they had agreed on a verdict, or that they received any communication other than what we have already considered, or that they were guilty of any miscarriage. This shows that the verdict is free from taint or suspicion, and I have not found any instance in the books where a verdict has been set aside for the misconduct of the officer, when no misconduct was alleged on the part of the jury.

After all, has justice been done to the defendants? They have been fairly and patiently tried, have had the aid of learned and faithful counsel, and every fact which could be adduced in their favor, and every argument which ingenuity could invent were submitted to the court and jury in their behalf. I find no

Commonwealth v. Goodenough.

fault with the jury; in fulfilling the duty which they owed to the commonwealth and to their consciences, they could not have done otherwise. No party who is so unfortunate as to be brought into court as an accused person, can expect more than has been done for these defendants, and it only remains for me to say, that the motion in arrest of judgment and for a new trial is denied.

They were then sentenced; Sargent and Horton to suffer three months imprisonment in the common jail; and De Coster to suffer two months imprisonment, and all to pay costs of prosecution. From this judgment they severally appealed to the next supreme judicial court, and gave bonds to prosecute the appeal with effect.¹

DECEMBER TERM, 1825.

COMMONWEALTH v. EPHRAIM GOODENOUGH.

Where a party relies on the plea of a former acquittal, it must appear from the records, that the offences were one and the same; and that it was described in the first indictment, so that judgment could have been rendered on it, upon conviction of the defendant.

After a jury has been empaneled to try the issue, the indictment cannot be withdrawn from them, upon the entry of a *nolle prosequi* by the commonwealth's attorney, without the consent of the defendant.

Upon the trial of a person for passing a counterfeit bill, under the statute of 1804, c. 120, (Rev. St. c. 127,) the omission to allege in the indictment that the defendant passed the bill with an intention to defraud, is fatal.

THACHER, J. The defendant, Ephraim Goodenough, is indicted upon the act of 1804, c. 120, s. 2 and 3, for that he, on the 16th of September, 1825, did utter and tender in payment to one Samuel Gookin, a certain counterfeit bank-bill, purport-

¹ This appeal was not tried.

ing to be payable to the bearer thereof, and to be signed on behalf of the president, directors, and company of the Phoenix Bank, licensed and established as a banking company within this commonwealth, he well knowing that it was a counterfeit bill, and with intent thereby to defraud the said Gookin, against the statute. The bill is set forth according to its tenor. To this indictment the defendant pleads that at the last October term of this court, he was indicted for the same offence, and upon the trial thereof, he was duly and legally discharged by the verdict of the jury, who had been empaneled and sworn to try the issue, and he makes profert of the judgment. To this plea the commonwealth, by its officer, after oyer, prayed for and had of the record, demurs, and the defendant joins in the demurrer. The defendant's plea contains the necessary averments, is correct in point of form, and is a good answer in law to the indictment, if it is founded in truth. This is to be determined by the court on inspection and by comparison of the two records.

Where a party relies on the plea of a former acquittal, it must appear that the offences were one and the same, and that it was described in the first indictment, so that judgment could have been rendered on it in conviction against the defendant. In other words, the first indictment must contain no material defect, and the proceedings must have been according to law. If the record should fail in either of these respects, it will follow, whatever proceedings may have been had, that the defendant has not been before in jeopardy. And it is the duty of the court in all cases to inspect the record, and not to render judgment, where a material defect appears in the indictment, or the proceedings have not been according to law. On comparing the two records, there appears to be a variance in the recital of the bills. The words "on demand" are not contained in the first indictment, but they are found in the second. Both profess to recite the bill according to its tenor, which supposes an exact verbal copy. Now if both indictments intend to

relate to the same bill, in the one or the other there is a fatal variance. In the one or the other, the indictment must fail on the evidence. If the words "on demand" were contained in the bill, the first must fail; if they were not contained in it, the last would fail. If the offence is the same in both cases, the evidence would apply to each. But the variance between the two bills is material, and it cannot be intended that they are one and the same. Great strictness prevails in criminal cases. The statutes of jeofail do not reach them. But where judgment is arrested for defect of the record, or the prosecution fails for an erroneous description of the offence, the only remedy is by a new indictment, which gives to the party accused, on another trial, one chance more for escape.

The cause of the failure of the first indictment does not appear upon the record; but it is known to us, that it was owing to the omission of these words "on demand" in the recital of the bill. The jury had been empaneled and sworn to try the issue, when, upon perceiving the omission of these words, the attorney for the commonwealth declared he would prosecute no further. The defendant would not consent to withdraw the indictment from the jury, and claimed a verdict, notwithstanding the entry of the *nolle prosequi* upon the record. I sustained the claim, and the jury returned a verdict of acquittal, under my instruction to them, that the commonwealth had failed to prove the charge. If this proceeding was not correct, then it will follow that the attorney for the commonwealth may at any stage of the trial, and in any case, withdraw an indictment from the jury, when he perceives that the prosecution is like to fail from defect of evidence. Prior to the revolution of 1688, and during the reign of the Stewarts, the counsel for the crown did claim at their discretion, to discharge a jury after evidence given and concluded on their part. It is an observation of Sir Michael Foster, "that this was certainly a most unjustifiable proceeding, and he hopes, that it will never be brought into example." *The case of the two Kinlocks*, (Foster's R. 16.)

For it might be used for purposes of great oppression, especially in trials which excite great interest.

The doctrine has been recognized in this commonwealth. In the case of the *Commonwealth v. Kelley*, trial in the supreme judicial court, August term, 1801, on an indictment for having in his possession bank paper, a material used in counterfeiting bank bills, and with intent to counterfeit bills of the Newburyport Bank, it was discovered, after the jury had been empaneled and sworn, and some progress had been made in the trial, that there was no such bank in existence. The attorney-general, the late Governor Sullivan, first moved for leave to amend the indictment, which the court said they could not grant without the prisoner's consent. The prisoner, by the advice of the late Chief Justice Parsons, his counsel, who was then in practice, refused his consent, and thereupon the jury, under the direction of the court, acquitted the defendant. The court, which then consisted of Dana, Ch. J. and Robert T. Paine, Bradbury, Strong, Sewall, Thacher and Dawes, Justices, observed, that it was not the practice of the court to take an indictment from a jury, when once empaneled to try the same, without the consent of both parties. A new bill of indictment was returned by the grand jury at the same term against Kelley, on which he was tried and acquitted at the following term in February, 1802. At the same term of the supreme judicial court, in February, 1802, a person was indicted for uttering a counterfeit bill as true. After the jury had been sworn to try the issue, it was found that William Sherburne, the examining magistrate, whose testimony was necessary to prove the identity of the bill, was sick and unable to attend court. The attorney-general moved for leave to withdraw the indictment from the jury, and for a continuance for this cause. But the court refused to grant the continuance, assigning the reason, that after the jury were empaneled, they could not take the indictment from the jury without the prisoner's consent. He was acquitted. In both these cases, minutes of which I took at the time, the fault

was in the officer of the government. It would be otherwise, however, I think, if the witness should have been spirited away by the defendant, or the trial should be interrupted by the providence of God. In the case at bar, the defendant did not consent to discharge the jury. He could not be deprived of his legal right, and he was entitled to his acquittal. But notwithstanding the acquittal, I am clear in the opinion, that it was not a bar to a second indictment, wherein the bill should be truly set forth.

2. On examining the first indictment, it contains a material defect, so that judgment could not have been rendered on it, if the defendant had been convicted upon the trial. It is a well established rule, that cases grounded on penal statutes, should pursue the statute in describing the offence, so as to bring the party precisely within it. "The indictment," saith Stanford, "must set forth the offence in such manner as it is expressed in the statute." (Foster's Rep. 423.) Wherever an act, which is indifferent in itself, is made a criminal offence, when done with a particular evil intent, it is essential, in describing the offence, to aver the evil intent, and to prove it at the trial. Now in the sections of the act, on which this indictment was founded, it is declared, that if any person shall utter or tender in payment as true, any counterfeit bank bill, payable to the bearer, signed in behalf of any corporation by law licensed and authorized as a bank within this commonwealth, knowing the same to be counterfeit, with intent to injure or defraud any person, he shall, upon conviction, suffer the punishment which is there prescribed. The first indictment contains no allegation that the bill was uttered to Samuel Gookin, with the intent to defraud him. Separate from the intention to defraud, the offence is not within the statute, nor would the indictment be good at common law ; for to utter and tender a counterfeit bill to one, without the intention to defraud him, is not an offence either at common law, or under this statute. A counterfeit bill may be uttered and passed to one, without the intent to defraud

Commonwealth v. Cutler.

him. And therefore the statute requires, with good reason, that to make the act criminal, it should be done with intent to injure and defraud some one. The omission of this allegation in the first indictment was a material defect, which cannot be supplied by intendment, nor would it have been proper to render judgment on it, if the defendant had been convicted. The defendant's plea is for these reasons adjudged to be insufficient in law, and he must answer further to the indictment.

Austin, for the commonwealth.

S. D. Parker, for the defendant.

The defendant was put upon his trial on the 13th of December, found guilty of the offence, and sentenced to hard labor in the state prison for two years.

OCTOBER TERM, 1826.

COMMONWEALTH, BY INFORMATION, v. MICHAEL CUTLER.

It is not necessary, in order to recover the penalty provided in the first and second sections of the statute of 1817, c. 171, prescribing the thickness of the walls of buildings to be erected in the city of Boston, to give the notice mentioned in the eighth section of the same chapter.

Any citizen may prefer a complaint to the grand jury, or to the public prosecutor, who is authorized to proceed on such information, against a person erecting a building in the city of Boston with walls less thick than the statute prescribes.

An information, charging in the words of the statute, that the defendant erected the building complained of, is sufficiently certain, although it does not state whether he was the owner.

A complaint can be made against a person erecting a building in the city of Boston, with walls less thick than the statute prescribes, as soon as the building, in its general outline, is completed in those points to which the statute refers.

Commonwealth v. Cutler.

Under the statute of 1822, c. 18, allowing wooden buildings of certain dimensions to be erected in the city of Boston, brick buildings of similar dimensions, and with the same thickness of external partition wall, may be erected.

THIS information was filed in court by the county attorney on the 16th of September last, and came on for trial on Thursday, October 26th. The information contained two counts. 1. That said Cutler, on the 1st of August, A. D. 1826, did erect a building near Pleasant street, in the city of Boston, more than ten feet high from the ground to the highest point thereof, and did make the external walls thereof less than twelve inches thick, in the lower story, to wit, eight inches thick, and no more. 2. That he, on the 1st of August, A. D. 1826, did erect, near Pleasant street in said Boston, a building which is more than ten feet high, and which is separated from another building, which was also more than ten feet high, by a partition wall, which said partition wall is not twelve inches thick in the lower story, and not built up as far as is necessary, in order to cover the roof on said partition wall with flat stones at least two inches thick, and the said partition wall is not so covered or capped with flat stones. Plea, not guilty. The information recited so much of the law of 1817, c. 171, as applied to this case.

Samuel D. Harris, chief engineer of the fire department in the city, was called as a witness. An objection was suggested to his competency, on the ground that as complainant and informer, he would be entitled to a portion of the fine. But the objection was not persisted in, it not appearing that any portion of the fine would go to him. By the fifteenth section of the act on which this prosecution is founded, it is provided, "that where one or more of the firewards shall be examined and sworn as a witness in any prosecution founded on that act, record thereof shall be made, and the whole fine shall enure to the use of the town of Boston." Mr. Harris being sworn, testified that the house built by the defendant, is in a block situated

near Pleasant street; that he viewed the walls of the house sometime in July last; and that they were at that time going up, and the lower story was less than twelve inches thick. He considered the lower story to consist of the rooms which are immediately under the parlor chambers. He then informed the defendant that his walls did not conform to the law, and that he had subjected himself to a prosecution. At the time the complaint was made, the partition had not been carried up, and the house was not finished. The house was built on an inclined plane, higher in the front than in the rear; it was a two-story house in front; the lower story consisting of two rooms on a level with the street, directly over the cellar, and which the family would occupy as parlors. Whether there were two or three stories in the rear, he was not certain. The house had a cellar, the front part of which was entered from the street, on a level with the ground in the rear. He had spoken to the defendant, and had urged him to make his house conform to the law. The defendant had replied to him, that the law had not been enforced for several years, and he admitted himself to be both the owner and builder. After the prosecution was instituted, he had, at the defendant's request, been to look at the house, and found that the wall of a part of the lower story had been made twelve inches thick; but the other parts were plastered and covered, and he could not tell of what thickness they then were. Daniel Naptin, a witness, testified that the back part of the house was three feet above the level of the ground; that the parlors were directly over the cellar. The counsel for the defendant asked the witness what was the general impression of the citizens as to the legality of a house of this description. But the question being objected to by the county attorney, the court decided that it was improper.

The evidence for the prosecution was here closed. On the part of the defendant, Abel Rice was sworn as a witness. He stated that he had been employed by the defendant as one of the workmen on the house, and that it had no kitchen on a

level with the cellar in the rear under the parlors. That the height of the house from the underpinning to the highest point in the roof, was twenty-nine feet and six inches, and on the ground eighteen feet six inches in front, and thirty feet deep. The external walls of the lower story were but twelve inches thick. The partition wall of the lower story above the cellar is likewise twelve inches thick. Some of the walls were of this thickness before the prosecution was commenced. The partition wall is now carried up through the roof, and covered and capped with stone. On his cross-examination he stated that the walls originally were but eighteen inches thick in the lower story, that about the first of August last, the defendant informed him and the other workmen, that he had learnt from Colonel Harris, that the walls were not according to law, and he ordered them to make the necessary alterations so as to make them to conform to the law. This was done by laying a course of brick up against the walls, in mortar, and in the usual way. The whole partition wall is of brick, is carried up and capped with stone, and was completed on 28th of September last.

William Minot, Samuel Hubbard, and William Sullivan, for the defendant, stated various objections to the prosecution.

1. That the prosecution was commenced too soon, because the house was not finished on the 16th of September, on which day the information was filed ; and also because no notice had been given to the defendant thirty days before the commencement of the suit, according to the eighth section of the act of 1817.

2. That there was no legal commencement to the prosecution, because it did not originate on the complaint of one of the firewards of the city, according to the twelfth section of the act of 1817.

3. That the information was defective, because it did not appear with certainty whether the defendant was prosecuted as the builder or as the owner of the house.

4. The fourth and principal ground of defence was, that the

building came within the description and intent of the act of 1822, c. 16, which authorized wooden dwelling-houses to be erected within the city of larger dimensions than the building for which the defendant was on trial.

Austin, for the commonwealth, contended as to the first, that it would be unreasonable to delay the prosecution till the house should be finished; for the earlier the prosecution was commenced, the sooner would the builder be put on his guard; and it would be both more easy and less expensive to him to make the house conform to the law, while the walls were going up, than to delay it till the house should be finished. The eighth section describes a distinct offence, for which a new penalty is provided. If a person wilfully continues his building in an unlawful state for thirty days after notice from the firewards, he becomes liable to a fine not exceeding one hundred dollars, nor less than twenty dollars, and to a like penalty for every thirty days afterwards, that he shall neglect to repair his building. He contended that the information was drawn with sufficient certainty, because it charged, in the words of the act, that the defendant erected the building. The person who erects or builds incurs the penalty as well as the owner. He admitted that if the act of 1822, c. 16, operated as a repeal of the act of 1817, as to brick buildings, which were to be erected after the passing of that act, the building would be protected, because it was within the prescribed dimensions. But he contended that the act of 1822 applied only to wooden buildings, and not to those which were constructed of brick, as in this case.

THACHER, J. The eighth section is intended to compel the owner of a house, which was not built according to law, to make the necessary alterations in the building, at whatever time afterwards the fault should be discovered, and into whose hands soever it should have passed. It may be, that at the time the fact should be discovered, it will belong to some person who was neither the original owner nor builder. The firewards are required in such case to notify the owner, or person bound to

keep the building in repair, as the guardian, for instance, of a minor, or the husband who holds the estate in right of his wife, or even in some cases, perhaps, the tenant holding under a lease, which obliges him to repair. If such person should neglect for thirty days to repair after notice, he might thereby incur this penalty. If this is the true intent of this section, it provides for a case, where the fault may be discovered even long after the building has been erected; and reaches not only to the original owner and builder, but to a purchaser or to any other person, who being possessed of the estate at the time is holden to keep it in repair. If this is the true construction of this section, as I believe it to be, it would not release the original owner and builder from the penalty, which is provided in the first and second sections, for the original fault in the construction.

As to the objection that the prosecution must, to be legal, be founded on the complaint of a fireward, I am of opinion, that though by the twelfth section of this act, the firewards are required "to inquire after all offences which shall come to their knowledge, and cause the same to be prosecuted;" yet as there is no clause which restricts others from making complaints, any citizen may prefer a complaint to the grand jury, or to the public prosecutor, who will be fully authorized to proceed on such information, and cause the party offending to be brought to justice.

THACHER, J., then charged the jury substantially as follows. The prosecution being founded on a statute, which made that to be an offence, and subject to a penalty, which prior to the statute was an innocent and lawful act, it has ever been holden in such cases, that the government should strictly prove the offence as alleged, and that the defendant was entitled to an interpretation of the law, which would be most favorable to him, provided that it should be consistent with the intent of the law. The more especially is he entitled to such construction in a case, where it seems to be admitted that the law has been

suffered for some years to go into desuetude, and where an impression had prevailed in the minds of many, that the act which is now charged as an offence, was lawful. In the course of the trial many questions of law have been raised, some of which are new to the court, on all of which, however, I shall express my opinion with simplicity and candor, according to my understanding of the law ; but it is my right and duty, to express a different opinion on the same points, in any future trial, if on further inquiry and reflection I shall see cause so to do. In the highest tribunal of the commonwealth, each of the justices has the aid of his learned associates to assist him in revising and correcting any opinion formed and expressed during the heat of a trial. There is good reason, therefore, in this court, held by one judge only, that he should not hold tenaciously to any judicial opinion by him suddenly expressed, but always be open to the light and instruction, which are to be derived from the industrious research and able arguments of learned counsel.

On the point raised, whether the defence was laid with legal propriety, I am of opinion, that the information is sufficient in point of form and certainty, and you are only to inquire if the facts charged are proved to your satisfaction. By the fourth section of the act of 1817, the person who erects a building, or who causes it to be erected, as well as the owner, is liable for any violation of the law. You must be satisfied that the house was erected before and at the time the prosecution was commenced. For it would be against natural equity not to allow a party, while he is building, to make his building to conform to law. The act says, "no house or building shall be erected or built," &c. The indictment charges the defendant, that he, on the 1st of August, 1826, did erect or build a certain house or building. Both the law and the information suppose the house to be erected at the time that the prosecution is commenced. But it is not necessary to wait until the house shall be finished internally for occupation. If the walls be carried up, and the roof covered and slated, so that the building in its

general outlines is completed in those points to which the statute refers, it will, in legal contemplation, be built, and the owner and builder will be liable for any breach of the law. While the house is building, the owner or builder may therefore correct any errors of judgment or in law, which he may perhaps unintentionally have committed during the process. If, however, the owner or builder should unreasonably delay completing his building, or if he should purposely leave it in an unfinished state, it would be deemed a fraud on the law, so that he might well be made subject to its penalties. If, therefore, the building in this case was not erected at the time the prosecution was commenced, the defendant will be entitled to an acquittal.

The defendant contends, as a substantial ground of defence, that his house was protected by the act of 1822, c. 16. On this point it is clear, not only from the title of the act of 1817, c. 171, but from its many provisions, that its great and sole design was, to secure the town of Boston from damage by fire. This was done by prohibiting the erection of any building of wood or other combustible material, which was more than ten feet high from the ground to the highest point in the roof. No one would say, that the object of this law was to adorn the town with brick and stone buildings of lofty height and dimensions; such might be one effect of the law, but not its legal and defined object. Now the act of 1822, c. 16, makes it lawful to erect wooden buildings within this city for dwelling-houses only, of the following dimensions, namely; "the posts to be not more than eighteen feet, the roof to be of a regular pitch of one third; the bottom of the sills to be elevated not exceeding eighteen inches above the level of the street, or above the point where such level shall be determined on by the city authorities; such buildings in no case to be more than thirty feet in height from the bottom of the sill to the highest point of the roof, and in no case to be more than forty by twenty-five feet on the ground; the roof to be slated, and to have at least one window or scuttle in the same." The sixth

section of this act declares, "that all laws now in force, so far as they are inconsistent with the provisions of this act, be, and the same are hereby repealed." This act has the same general design as that of 1817, modifying it, however, in certain respects. The restrictions on erecting wooden dwelling-houses are still continued when they exceed the foregoing dimensions; but that the intent of this act was to guard from damage by fire, is apparent, from its requiring brick partitions and side walls of eight inches in thickness where houses are built in blocks or within four feet of each other. If this act does not operate as a repeal of the act of 1817, as to brick dwelling-houses, of like dimensions, then this absurd and unreasonable consequence will follow, that a dwelling-house, whose external walls are of wood, and wholly combustible, may be erected within this city, when it would be unlawful, and subject the town to a penalty, and to a permanent annual tax, to build a dwelling-house of the like dimensions of brick or of stone. It is the duty of a court to give such reasonable construction to a statute, as will make it consistent with good sense, and to harmonize with the general system of the law on the same subject-matter. I am therefore of opinion, that the act of 1822 did operate as a repeal of the act of 1817, as to dwelling-houses of the dimensions described in the act. And as it is conceded by the prosecutor that the dimensions of the building of the defendant are within that act, you are bound in law to render a verdict of acquittal.¹

The jury accordingly returned a verdict of not guilty.

¹ *Ex parte Carruthers*, (9 East, 44.)

DECEMBER TERM, 1826.

COMMONWEALTH v. SELDEN BRAYNARD.

Where, upon the trial of an indictment for selling lottery tickets, certain witnesses for the commonwealth presented an affidavit to the court, setting forth that they believed that indictments for selling lottery tickets had been returned against them, but that, to their knowledge, no process had been issued upon them, and that it was necessary that they should inspect these indictments, that they might be better advised of their duty as witnesses in the case on trial; it was *held*, that the delay in the issuing of process, in such cases, was within the sound discretion of the public prosecutor; that unless the contrary was shown, the court would presume that he deemed the delay necessary; and that the indictments should not be open to inspection.

It is the province of the court to judge whether a direct answer to a question may tend to criminate a witness.

Where, on account of the sickness of a person summoned as a witness, his book-keeper was summoned to appear and bring his employer's book of original entries, and upon his appearance with the book without first informing his employer that he was to bring it, the defendant obtained the book from him and sent it to the employer; it was *held*, that the defendant was guilty of a contempt of court.

To support an allegation in an indictment, that the offence was committed on a particular day, it is sufficient to prove its commission sometime before the finding of the bill by the grand jury.

Where, upon the trial of an indictment for selling lottery tickets, it is proved that the defendant sold the tickets by a clerk or other agent, the jury will be authorized to convict the defendant.

If a person send to a printer to be inserted in his newspaper, an advertisement of lottery tickets for sale, he is guilty of advertising and causing to be advertised, as set forth in the statute of March, 1826.

THIS indictment was upon the law for suppressing lotteries, passed on the 4th of March, 1826. It contained five counts which were intended to charge four distinct violations of the law. The first charged that the prisoner, upon the 10th of September, 1826, sold a ticket on the Washington Canal and

Rhode Island State Lottery, which was not authorized by any law of this commonwealth, to a person unknown. The second charged that the prisoner caused to be advertised in the *Evening Gazette*, a newspaper published in Boston, on the 16th of September, 1826, tickets and parts of tickets for sale in a lottery, which was to be drawn the Wednesday next following, and which was not authorized by any law of this commonwealth. The third and fourth count charged that the prisoner, on the 26th of September, 1826, sold to one John J. Jerome, three hundred tickets in the Connecticut State Lottery, which was not authorized by any law of this commonwealth. The fifth count charged that the prisoner, on the 30th of September, 1826, sold twenty different tickets to divers persons unknown, in the Connecticut State Lottery, second class, which lottery was not authorized by any law. The defendant pleaded the general issue, and the trial commenced on Thursday, December 7th.

John F. Evans was called and sworn as a witness for the prosecution. He stated that he had been for two years past a clerk to the prisoner, who was a lottery and exchange broker. The county attorney then put to him the following question: "Do you know that the prisoner sold any lottery tickets in the course of the last summer?" To this and to various other questions he refused to answer, alleging that in so doing he believed that he should criminate himself. Upon an appeal to the court, the judge told the witness that he could not perceive that his answer would tend to criminate himself, whether he should reply in the affirmative or negative, and that it was his duty to answer the question. But the witness persisting in his refusal, the judge admonished him that in obstinately refusing to answer a proper question, he would incur the consequences of a contempt of court. He was, however, permitted to stand aside, and the county attorney next called Edward Barnard, who testified that he had for eighteen months past been doing business as a broker, in the prisoner's name, upon his own account

and not as his agent. The county attorney then put to him the following questions: "Do you know that the prisoner, during the last summer, delivered lottery tickets to any other person than yourself to sell for him?" "Do you know that your brother, Ebenezer Barnard, who is the prisoner's clerk, did sell in the prisoner's office, in the course of the last summer, any lottery tickets?" To these questions and to others of a similar import the witness refused to answer, assigning the same cause for the refusal as had been done by the preceding witness. The judge admonished him likewise that it was his duty to answer these questions, and that he might do so with perfect safety to himself. He was then permitted to stand aside. The next witness called for the prosecution was Ebenezer Barnard, who stated that he was a clerk to the prisoner in his office, at No. 16, State street, where he carried on the business of a lottery broker, in the months of August and September last. He was asked by the county attorney the following questions: "Do you know that the prisoner bought and sold lottery tickets, in the months of August and September last?" "Do you know that the prisoner sold, and with his own hands delivered lottery tickets to any persons in those months, and without your interference?" "Do you know that certain lottery tickets were sold on account of the prisoner to one John J. Jerome, in August or September last?" "Did said John J. Jerome, on the 27th of September last, purchase of the prisoner three hundred lottery tickets?" The witness refused to answer these questions, alleging the same cause for his refusal, as the other witnesses, and being likewise admonished, was permitted to stand aside. John J. Jerome was last called and sworn as a witness for the prosecution. He was asked by the county attorney, "Did you see Ebenezer Barnard, the clerk of the prisoner, deliver any lottery tickets to any person in September last?" "Did the prisoner ever acknowledge to you that he had sold any tickets in the second class of the Connecticut State Lottery to any person in September last?" The witness refused to answer these questions, as the others had done.

The time for adjournment having arrived, the judge stated to these witnesses, that he perceived that they had been ill advised as to their duty in testifying as witnesses in this case; that he should, however, give them until the next morning to be better advised; but that as they had incurred the guilt of a contempt, they should severally recognize for their appearance at that time before the court, to answer for their contempt, and also to testify as witnesses in the case, in the sum of two hundred dollars each, and with sufficient surety in the like sum. They severally recognized accordingly. At the opening of the court on the following morning these witnesses appeared, and were severally called upon the stand, and required to declare whether they were ready to answer the questions put to them the day before, under the orders of the court. They severally persisted in their refusal, still assigning the same cause which they had offered before. While the examination was proceeding on the preceding day, the witnesses, by their counsel, moved the court for an order on the clerk to exhibit to them certain indictments, which were supposed to have been returned against them by the grand jury, at this term, for offences under the act for the suppression of lotteries, and which were on the files of this court in his care. The judge required the motion to be put in writing, and to be accompanied by an affidavit. This was done, and in the affidavit they stated that they had been informed and believed that such indictments had been returned against them, but that no process had to their knowledge been issued upon them, nor had they received any notice thereof in any other way from the court. They further declared that they believed it was necessary for them to have an inspection of these indictments, that they might be better advised of their duty as witnesses in this case.

S. D. Parker was permitted to argue the motion in behalf of the witnesses, and insisted that when an indictment had been returned into court, it became a public record, and that any person interested in it might rightfully claim both inspection of the paper and a copy of it.

Commonwealth v. Braynard.

Austin contended, in opposition to the motion, that until process had issued upon an indictment, no one could claim right to inspect it, and that it would be highly injurious to the public justice to allow the motion. He further declared, however, that if such indictments had been found, they had no relation to the case which was then upon trial; and he also intimated a strong belief that these prosecutions against the witnesses had been instigated by the prisoner who was on trial, and with the express design to prevent them from freely testifying at the present trial.

THACHER, J. It is the right of the public prosecutor, in the exercise of his trust, to use a sound discretion in moving for process against a party, and in causing him to be brought to trial. Cases may be supposed, in which it would be agreeable to sound discretion to delay issuing process upon an indictment returned by the grand jury. And if indictments have been found against these witnesses at the present term, and process has not as yet been issued to bring them into court, I shall presume, till the contrary shall be made to appear, that in the judgment of the public prosecutor such delay is proper and necessary. In granting this motion, I should adopt the principle, that as soon as the grand jury have returned their indictments into court, any one might demand an inspection of them. This would certainly enable the guilty to evade the punishment of their crimes by flight or otherwise. But delay cannot injure the party accused. He will always be allowed, as his right, time to answer to the accusation and to prepare for his defence. The applicants allege that it is necessary for them to see these indictments, that they may know how to testify so as not to implicate themselves. But they are to testify under the authority of the court. They will not be required to answer any question which will criminate themselves, in the trial of an indictment now pending, or which may hereafter be found against them. And as it is not necessary for their safety, nor expedient for the government, the motion is denied.

The witnesses having refused to answer, upon motion of the county attorney, they were called upon by the court to show cause why they should not be dealt with as for a contempt. *Parker* contended, that in point of law a witness was not bound to answer any question which would tend, in the opinion of the witness, to criminate himself, although the court should be of a different opinion. The knowledge of the fact is in the mind of the witness, and not of the court. The fact required to be stated is known to the witness, and may constitute a link in the chain of evidence which would be required to convict himself. He further argued, that three of these witnesses had acted as clerks to the prisoner; that the words of the statute for suppressing lotteries were very broad, and if they had sold a ticket on his account, without any personal interest of their own, it would still subject them to the penalty of the law.

Austin argued, that no possible answer which the witnesses could give to the questions proposed to them, would tend to criminate themselves, and that it was the right and duty of the court to determine the propriety of any question which should be put to a witness, and whether he was bound to answer it. He denied, that on principles of law a clerk would be liable for selling a ticket in the presence of his master and for his account, the clerk having no interest in the transaction.

Both the counsel referred to various passages in the elementary treatises of McNally, Phillips and Peake on Evidence, and to the trial of Aaron Burr, for treason, before Marshall, Ch. J., in the circuit court of the United States for the district of Virginia, in 1807.

THACHER, J. Where a witness refuses to answer a legal and pertinent question, put to him in the course of his examination, and after he has been duly sworn, it is considered as a contempt offered by him to the public justice. It is undoubtedly true, both at common law and by the twelfth article of the bill of rights, that "no man may be compelled to accuse, or to furnish evidence against himself;" and it is the duty of

Commonwealth v. Braynard.

the court to secure to every witness the enjoyment of this constitutional privilege. Whenever a witness claims, upon his examination, to be exempted for this cause from giving testimony, the court must consider and determine whether it is a case which falls within the rule. For if, by merely declaring his belief that the answer to a question would tend to criminate himself, he should be exempted from testifying, it is apparent that the public justice might be defeated in every instance. It would always be at the option of a witness to testify or not ; whereas a witness is as much bound to testify to the truth in proper cases as it is the duty of the court to protect him upon all proper occasions in his constitutional right. But the right to decide upon the legal propriety, pertinency and materiality of a question, is by law vested in the court. If the court perceives, that by a direct answer to any question, a witness may criminate himself, the witness shall be required to declare, upon his oath, whether he believes, that by such answer, he would criminate himself. And if the witness shall declare such to be his belief, the court will protect him in his refusal to answer the question. But if, on the contrary, the court should be of opinion that the direct answer to a question would not tend to criminate the witness, he may be compelled to answer it, and it will be a contempt on the part of the witness to disobey the order of the court. This rule was established as the correct rule of law, at the trial of Aaron Burr, where the legal questions were debated with consummate ability by eminent counsel, and decided by the court with the utmost circumspection. It is my opinion, that these questions put to the witnesses might be answered by them without danger or prejudice to themselves, and that the answers would not have the tendency to subject them to a legal prosecution. As they have deliberately refused to answer the questions, and persist in their refusal, I am of opinion that they have generally incurred the guilt of a contempt of court.

They were therefore ordered to be committed to jail for the space of four days, and the trial was adjourned to Tuesday

morning, the 12th December. The court ordered the clerk to make a record of these proceedings, and to furnish the sheriff with a warrant of commitment, wherein the cause should be set forth with accuracy.¹ The warrant set forth the questions put to the witnesses, and the proceedings on their refusal to answer them.

On the following day, these prisoners sent into the court a humble petition, in which they declared, that in refusing to answer the questions put to them, they intended no disrespect to the law, or to its officers; that they had been induced to withhold their testimony by the advice of counsel to one of their number; but that they were now convinced of their error, and were ready to testify freely under the orders of the court. And they prayed that they might be released from imprisonment. This petition was accompanied by an affidavit of each of the prisoners, in which they verified the truth of the facts which were stated in the petition, and confirmed the declaration of their readiness to testify freely, whenever the trial should proceed. On receiving these petitions and affidavits, which were presented and read in court, by John B. Davis, their counsel, the judge ordered the prisoners to be brought into court, and after a short address to them, discharged them from the residue of their sentence.

The court was then adjourned to the 12th of December, and at the opening of the court on that day the county attorney presented a complaint to the court against Braynard, the prisoner, which charged, that he had taken from John Masters, a witness, who had been duly summoned to attend at the trial on

¹ Immediately on the commitment of these persons to the common jail, they applied to the supreme judicial court, which was then holden by Parker, C. J., in the county of Suffolk, for a writ of *habeas corpus*, which being granted, they were brought into court, and the question of the legality of their commitment was fully argued and considered by Parker for the prisoners, and Austin for the commonwealth. After a full hearing the prisoners were remanded into custody, the court declaring that their commitment was legal and proper.

Commonwealth v. Braynard.

the 7th and 8th of December, a certain account book, which he had been ordered by the summons to bring with him into court, that the book was withdrawn from the court by the prisoner, and was detained by him, so that it could not be produced by the witness, nor used at the trial. The county attorney then moved that the prisoner might be required forthwith to answer for his contempt. John Masters, the witness, being in court, was ordered to be sworn, and upon questions proposed to him, he disclosed the following facts, namely, that he was the book-keeper of W. W. Clapp, the editor and publisher of the Evening Gazette, who, it appeared had been sick for several weeks, and by the certificate of his physician, was still confined to his chamber, and wholly unable to attend court. Said Masters had the charge, in the absence of Mr. Clapp from his printing office, of his account books, and had, in obedience to a *subpoena duces tecum* to him directed from the court, brought with him into court, on the 8th instant, Mr. Clapp's book of original entries. But he had not consulted Mr. Clapp on the subject, nor had his permission to carry the book into court. While attending court, he met the prisoner, who was then upon trial, who stated to him, that he ought not to have brought that book into court without Mr. Clapp's permission, and advised him to carry it away. The witness did not choose to carry the book from court himself, but suffered the prisoner, who offered to carry it to Mr. Clapp for him, to take it into his possession, and to carry it out of court. Neither the book nor the entries were called for on that day, but since that time, the book had been sent to Mr. Clapp, and it was not now in court, and the witness could not produce it. Upon this verification of the complaint, the prisoner was ordered to show cause why he should not be adjudged guilty of a contempt, for this unlawful interference with the witness, and subtraction of the book. On the request of his counsel, time was allowed to him to prepare an answer to the complaint, in the form of an affidavit, which was accordingly exhibited. In the answer, the prisoner admitted the fact,

that he took the book from the witness, advising him at the time that he had no right to bring it into court without Clapp's permission, and declared that he took the book into his own possession, to prevent an injury to said Clapp, from an improper exposure of its contents. He disavowed any intention to be guilty of a contempt of the authority of the court. He further admitted, that both Masters, the witness, and himself were advised by his counsel, while in court, on the same day, that it was the duty of Masters to appear in court with the book, in obedience to the summons, but to inform Mr. Clapp of the fact, that he might take any measure which he would deem necessary for the protection of the book, and to prevent an improper exposure of its contents. He closed with saying, that if he had done wrong, it was the sin of ignorance. Arguments were then made by their respective counsel.

THACHER, J. It appears that owing to the sickness of W. W. Clapp, who was summoned but could not attend as a witness for the commonwealth, on the trial of Selden Braynard, the commonwealth's attorney caused a summons to issue to John Masters, his book-keeper, to appear as a witness, and to bring with him into court, Mr. Clapp's book of original entries. The *subpoena duces tecum* was issued, as is the usual practice in such cases, without any previous application to the court, but at the request of the commonwealth's attorney. Masters, having the book in his possession, brought it into court in obedience to the summons. It is not now a question, whether the book was legal and proper evidence, or whether it could be used at the trial. The court would be bound to protect both the witness and the book from any improper use, which should be attempted to be made of it. If a party on trial, or any other person, may take from a witness, with an intention to suppress evidence, any book or document, which he is ordered to produce in court, it is very apparent, that the public justice may be defeated, whenever it is for the interest of such party on trial, to suppress or subtract evidence. It is an assumption of

Commonwealth v. Braynard.

power, which belongs to the court. It is not enough for a party to excuse his conduct in such case by imputing it to ignorance. It is such a bold interference with the administration of justice, and the example is of so dangerous a character, that it is my duty to exercise the power, which belongs to every court, to guard its privileges by punishing the party for a contempt.¹ The complaint being established to the satisfaction of the court, the prisoner not having excused or justified his conduct, he was sentenced to imprisonment in the common jail for eight days, and to pay the costs of prosecution. The further trial of his cause was adjourned.² Braynard was kept in confinement in the common jail during the time specified in the order of the court; at the expiration of which time, on payment of the costs, he was discharged.

On the 19th of December, the case was again called for trial. John S. Ellery, the foreman of the jury, was absent, and it appeared that he had gone to New York on business, and that he would not return during the present term. The court thereupon ordered a new jury to be empaneled, the prisoner being permitted to put his objection thereto on the record. The several witnesses, Edward Barnard and Ebenezer Barnard, John J. Jerome and John F. Evans were sworn, and testified freely, answering all questions which were put to them, severally.

Austin, for the commonwealth.

S. D. Parker, for the defendant.

THACHER, J., instructed the jury upon various questions of law which had been raised by the counsel for the defendant, as follows:

1. The day mentioned in the indictment, on which the of-

¹ *Randall v. Bridge*, (2 Mass. R. 549.)

² On the following morning, Braynard sued out a writ of *habeas corpus*, returnable forthwith into the supreme judicial court, which was still in session; and after arguments by counsel, and full consideration, Parker, C. J., decided the commitment to be legal, and remanded Braynard to jail.

Commonwealth v. Weld.

fence was alleged to have been committed, is not material. All that is required to support the allegation, is to prove that the fact was done at some time before the bill was found by the grand jury. 2. If it is shown in evidence that the defendant sold the tickets by a clerk or other agent, for his benefit, it is sufficient to authorize the jury to convict the defendant. 3. If a party send an advertisement to a printer to be inserted in his newspaper, it is sufficient, to support the allegation, that such party advertised and caused to be advertised, in the words of the statute.

The jury convicted the defendant on the first and third and fourth counts, the two latter including but one offence, and acquitted him on the second and fifth counts. He was sentenced to pay a fine of two hundred dollars and costs of prosecution; from which judgment he recognized to prosecute an appeal to the next supreme judicial court.

JULY TERM, 1827.

COMMONWEALTH v. BENJAMIN L. WELD.

Where, upon the trial of an indictment for the felonious taking of a deed, it appeared that the defendant had contracted verbally to sell certain real estate to B.; that they met to settle the contract, and agreed upon a final meeting for that purpose; that in the meantime the defendant delivered to B., confidentially, a deed, that he might ascertain its correctness, neither party considering the business settled; that B. gave the deed to his counsel to examine the title, and if satisfactory, to leave it at the registry to be recorded, which was done; that upon the meeting for a final settlement at the registry office, a dispute arose between the parties on a collateral point, and the defendant asked the register for the deed, and on receiving it, destroyed it, calling upon those present to witness the act; it was held, that if the defendant honestly thought that he had a right to the paper, the idea of a felonious intent was excluded.

THE defendant was indicted for a felonious taking of a deed,

containing a conveyance of real estate, the property of Henry Allyne, and of the value of two hundred dollars, in the office of the register of deeds for the county of Suffolk, on the 19th of June, 1827. In another count the deed was described to be the property of Abraham Bird.

Henry Allyne testified that when he came into his office on the morning of the 19th of June, the defendant and Bird were there, apparently engaged in adjusting some business between themselves. The defendant asked him, in presence of Bird, for permission to look at the deed which had been left in the office to be recorded, on the preceding day, and indorsed by him in the usual manner, as recorded at that time. It was a deed wherein the defendant was the grantor and Bird the grantee. As soon as the defendant had received the deed, without looking at it, he put it in his pocket. Allyne demanded it to be returned to him; but Weld declared that there had been an attempt to impose upon him. Allyne remonstrated, but the defendant took the deed to the window, and turning round, said, "I call on you all to witness that I destroy the deed," and then tore it in pieces, throwing the fragments out of the window. Bird declared at the time, that it was his property. That they came, as he understood, to adjust the matter; that Weld had, at Bird's request, corrected an error of a date in the deed, and it was not until after the attempt at the adjustment had failed, that Weld got the deed into his possession in the above manner.

John R. Adan testified that he was in the office at the time, engaged in the investigation of a title. He took no notice of the dispute until Weld appealed to him on the right which he claimed to take back his deed. Adan told him that he conceived that he would do wrong to withhold the deed from the register, that it was in his custody, and he could not deliver it up, even with the consent of both parties, to be cancelled, as in case of an attachment a third party might have an interest. Weld persisted in his right, and destroyed the deed, declaring at

the time "that it was because it was improperly and surreptitiously obtained from him, and had been brought to the office to be recorded without his knowledge or consent."

Charles Hayward, called by the defendant, testified that Weld brought the deed to his office, signed and acknowledged it in his presence, and at his request the witness signed his name as a witness. Bird was not there; the deed was not delivered to any one, and Weld carried it away. George Gay, also called by the defendant, testified, that on the 18th of June, the deed was brought to him with a request from Bird to examine the title at the register's office, and if it was clear, to leave it there to be recorded. He did so. There was an error in the date of a mortgage which was mentioned in the deed, of which he informed Bird, who said he should see Weld on the next morning, and doubted not that the error would be corrected.

Abraham Bird was then called on behalf of the prosecution, and testified, that on the 18th of June, Weld brought this deed to his counting-room, for the purpose of settling the contract for the purchase of the estate described in it, for which he had agreed to pay the defendant \$3500. The estate was subject to certain incumbrances, more especially to a mortgage to the city for \$1000, on which there was a sum due for interest. He had agreed to pay \$3500, and supposed that the understanding between them was that the interest due on this mortgage was to be charged to the defendant. The defendant had noted on paper three items, which amounted to \$210. Deducting the interest on the mortgage, \$119 remained to be paid on the settlement to the defendant, which calculation he made at the time, and supposed that the defendant approved it. The witness asked the defendant to leave the deed with him for examination, and the defendant said he was not afraid to trust him with the deed or for the money; and they then agreed to meet at the counting-room of the witness on the morning of the 19th of June, for the purpose of a final settlement. If any fault was found either with the deed or with the

title, it was to be returned to the defendant, and the money was not to be paid. At the time appointed the defendant called on him, and at his request went to the registry to correct the date. He followed him to pay the money and settle the business. The defendant there declared that it was his understanding of the contract, that the witness should take the estate for \$3500, subject to the mortgage which the witness was to discharge; and it would appear, by referring to the deed, the fragments of which had been collected by the register and pasted together, that it was therein so expressed, "subject to the mortgage, the principal and interest of which the witness was to pay."

That supposing it to be understood between them, that \$119 was the balance to be paid by him to the defendant, he put that amount in bills into his hands. The defendant went to the window to count it, but as soon as he ascertained the amount he declared that it was not enough. That he (the witness) said that it was all that was due; that the defendant offered to return it, but that he refused to accept it; that the defendant then threw it upon the table, and it was left there.

Asahel Gilbert testified that he was present at Bird's counting-room on the 18th of June; that he had been instrumental in affecting the agreement between the defendant and Bird; that Bird was to pay \$3500, and no more; that when the defendant produced his memorandum and left it on Bird's table, he said that so much was due to the city. Bird said that the interest was to come out. The contract between them was not in writing, and this point was not fully settled. He told the defendant in his office, when he made the contract with Bird, that Bird would not allow more than \$3500, and supposed that the defendant so understood it.

Lemuel Shaw, for the defendant, relied upon the following points. 1. That there never had been such a delivery of the deed as to make it final and available to pass the property. There was a formal execution of the deed, yet the delivery was understood

to be for a particular purpose, a confidence being reposed, and there was to be another meeting to settle the business. 2. The property not having been delivered, it had not become a deed or conveyance within the meaning and intent of the law, and therefore the description of the article failing, the prosecution must fail. 3. There was no felonious taking by the defendant, because he honestly believed at the time that he was only asserting his rights. 2 East's P. C. ; Hale's P. C. 589 ; *Inhabitants of Worcester v. Eaton*, (13 Mass. R. 378) ; *Maynard v. Maynard*, (10 Mass. R. 456) ; *Fairbanks v. Metcalf*, (8 Mass. R. 230.)

Austin, for the commonwealth.

THACHER, J. charged the jury as follows: The charge against the defendant, for which he is now on trial, is for stealing, on the 19th of June, 1827, a deed in the register's office, which deed was either the property of Henry Allyne, the register, or of Abraham Bird, the grantee who is named in it. To constitute the crime of larceny, there must be the wrongful or fraudulent taking and carrying away of the personal goods of another from any place, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent of the owner. If the property taken is not the property of the person who is described to be the owner in the indictment, the party must be acquitted, because the judgment would not be a bar to a second indictment for the same offence. Therefore the questions raised by the counsel for the defendant, whether the instrument in this case was a deed, and whether, by the acknowledgment and recording, it had become the property of the grantee or of the register, are proper to be considered. But suppose this deed had been taken by a third person, without any pretence of right, would it be material whether there had been a formal or final delivery ?

It seems to me that the circumstance, that the deed had not been delivered to be recorded, but only confidentially to be ex-

amined, and for investigating the title, and that there was to be a subsequent meeting for the purpose of a final settlement, goes to the intent, and tends to show that the defendant might have reasonably believed, that as he had not delivered the deed or received the consideration, he might innocently, as between himself and Bird, reclaim the deed. I think that though it was in possession of the register, he might have delivered back the deed on the consent of both the parties, and on finding that it had come to him by mistake. While the deed remained in the possession of the defendant, it was his property. It could not be Bird's property, until a delivery to him without condition. Still the delivery to him was such, that he might have maintained trespass for it against a third person; so it was sufficiently his property as to be so described in an indictment against a third person. It was sufficiently Allyne's property to be described as such, if the defendant had taken it for the purpose of charging him with the loss. Suppose that the defendant had taken it clandestinely, without the knowledge or consent of Bird, and with an intent to defraud him, as by refusing to execute a new deed, it would have been a felony.

But in the present case the strong ground of defence rests upon the failure of evidence to prove the felonious intent. A contract relative to the sale of an estate existed between the defendant and Bird, which was not, however, in writing. They met to settle the contract, and agreed upon another and final meeting for this purpose. But in the mean time the defendant delivered to Bird a deed which he had executed, that Bird might ascertain its correctness and the state of the title. It was delivered confidentially, and neither party considered the business as settled. When they met pursuant to the appointment for a final settlement, a dispute arose between them on a collateral point; in consequence of which the defendant reclaimed his deed, and upon Bird's refusal of it, took it without leave and tore it in pieces in presence of several persons, declaring that it had been obtained from him improperly, and requiring all to take

Commonwealth v. French.

notice of the act. If he was in an error on this subject and acted improperly, still if he honestly thought that he had a right to the paper, it excludes the idea of a felonious taking. It is a case to be settled in a civil action between the parties, and not under an indictment for a larceny. It will not be safe to convict the defendant.

The jury found the defendant not guilty.

MARCH TERM, 1827.

COMMONWEALTH v. THADDEUS P. FRENCH.

A temporary mental derangement produced by drinking intoxicating liquor, under which a boy of thirteen years of age committed a theft, authorizes a jury to acquit him.

THIS was an indictment against the prisoner, for stealing the watch of one Harvey McClenathan, in his shop, on the 17th of February, 1827. McClenathan, the prosecutor, testified that the prisoner, who was in his thirteenth year, with one Cyrus Wilder, a boy of about the same age, came twice to his shop in Purchase street, on Saturday evening, the 17th of February, at about seven o'clock. The second time he sold to French a cigar, and to Wilder a cake of gingerbread. While they were in his shop he took out his watch and hung it over his desk, which was near to the door leading to the street. Soon after they had left the shop the second time, Wilder returned for another cake of gingerbread, but came no further than the door. Shortly afterwards the watch was missed, and his suspicions rested on these boys. He went to the house where French lived, saw him and charged him with stealing the watch, but he strenuously denied the fact. The next morning however,

Commonwealth v. French.

French informed him that the watch was in the possession of one Alfred Johnson, another lad, and upon a warrant Johnson was taken with the watch, and he, French and Wilder were carried before the police court, where, upon their examination, Johnson and Wilder were discharged, and French was committed for trial. Curtis Wilder testified, that he knew nothing of the taking of the watch till French showed it to him as they were going from McClenathan's shop that evening to a book auction, in Broad street. Alfred Johnson testified, that French and Wilder came that evening to a cellar where he was, that French took him aside and informed him that he had taken the watch. He advised him to return it to the owner, and he got it into his own possession, with the intention of returning it to the owner the next morning. The evidence for the prosecution was here closed. A female, whose name was Miriam, a witness for the prisoner, testified that she resided in the family of the father of the prisoner; that the evening on which this occurred, Thaddeus appeared to be intoxicated with liquor, and under a derangement of his intellect, which she imputed to the liquor which he had taken. McClenathan being called again, admitted that when the boys first came to his shop, he sold them three cents worth of *Tom and Jerry*, which they drank there. On being interrogated as to the composition of that liquor, he refused to answer the question until he was informed by the court, that it was a proper question to be answered by him. He then said that the liquor was composed of eggs and sugar, beaten together with ginger, allspice, nutmeg and saleratus, to which was added a portion of rum, brandy or gin to suit the purchaser. He further said that he sold this composition to all who wanted it, children as well as men, and that it was usually sold in shops similar to his own.

Austin, for the commonwealth.

A. Moore, for the prisoner.

THACHER, J. instructed the jury substantially as follows. If

you believe that the prisoner had been put into a state of mental derangement, by drinking the noxious liquor and smoking the cigar which the prosecutor sold to him at the time, and committed the act while in this condition, it will be your duty to acquit him of the charge. It is an immoral act in the prosecutor to sell to these children such a vile composition, and it might well have happened that the combined influence of the liquor and cigar, on a child of so tender years, would produce a temporary insanity. This case essentially differs from that where a crime is committed by a person, who by a free indulgence of strong liquors, has at the time voluntarily deprived himself of his reason. By the policy of the law this rather enhances the offence. It was, however, an excuse constantly offered by offenders, and it is certainly true, that but few crimes are committed by persons who are habitually temperate in the use of ardent spirits.

The jury returned a verdict of acquittal, and after an admonition from the court the prisoner was discharged.

NOVEMBER TERM, 1827.

COMMONWEALTH v. JAMES DENNIE.

Upon the trial of a deputy sheriff, for receiving extorsive fees in the service of a writ, proof must first be given of the existence of the writ and its delivery to the officer.

Where, upon the trial of a deputy sheriff, for receiving extorsive fees in the service of a writ and execution, the indictment set forth that the writ, upon which the execution was founded, bore date the twentieth day of a certain month; it was *held*, that a writ dated the tenth day of the same month, offered in evidence as the foundation of the execution, could not be admitted, and that the variance was fatal.

It is a matter of law for the court, whether, under the statute of 1795, c. 41, prescribing the fees of certain officers, separate charges can be made by the officer for the attachment, and for the keeping of the property.

Commonwealth v. Dennie.

Under the same statute, the attachment of property by a deputy sheriff, includes the keeping of the property in his safe possession.

Where, upon the trial of a deputy sheriff for receiving extorsive fees, it was proved, that the money was not paid, but that a note was given by the debtor, which remained unpaid; it was *held*, that this would not authorize a conviction.

Where, upon such trial, it appeared that the property of the debtor, sold on execution, was sufficient to pay the officer's fees, but that they were paid by the creditor; it was *held*, that such fees were a charge to the debtor, and that the payment by the creditor was voluntary, and therefore that the officer was not guilty of extortion.

Where, upon such trial, it appeared that a writ was handed to the officer, upon which property was attached, and that, on the same day, another writ was handed to the officer in substitution for the other; and that, upon a settlement between the parties to the suit, the first writ was returned to the plaintiff and the last was retained by the officer, and not produced at his trial, and that the fees of the officer for a service had been paid; it was *held*, that the jury might presume that the writ, if produced, would prove a legal service by the officer.

Where, upon such trial, it appeared that upon a settlement between the parties, it was agreed, that the defendants in the suit should pay for the service, and the plaintiff paid the officer his fees, and received the note of the defendants therefor; it was *held*, that the officer, not being a party to such settlement, might rightfully demand his fees of the plaintiff, and that such payment was not voluntary in consequence of such agreement.

THIS was an indictment on the statute of 1795, c. 41, s. 6, (Rev. St. c. 128,) for the offence of extortion. Three cases were alleged, but the indictment contained seven counts. The first charged that the defendant, being a deputy sheriff, on the 22d of September, 1826, wilfully and corruptly demanded and received of one Benjamin Hall, the sum of twenty dollars, for serving a writ, in his favor, against Warren Studley and Daniel Cutter, when in fact he was entitled to have and demand only the sum of ten dollars and fifty cents. The second was for a like act of extortion, on the 23d of July, 1827, in wilfully and corruptly demanding and receiving of one Hawkes Lincoln, jr. the sum of eight dollars, for serving a writ, in his favor, on the personal property of one Frederick Conklin, by attaching the same, for which he was entitled to receive only seventy-four

cents. The third, which was contained in the three last counts of the indictment, charged for a like offence, in demanding and receiving of one John F. Bannister, on the 9th of July, 1827, for the service of a writ and execution in his favor, against one Reuben Brooks, the sum of one hundred and sixty-one dollars, when he was in fact entitled to have the sum of eighty-eight dollars and fifty cents only; and it was alleged that the said sum of one hundred and sixty-one dollars was paid partly in cash and partly by a note for one hundred and fifty-five dollars, made by Kittredge & Wyman, indorsed by said Bannister, and payable in thirty days, which had elapsed, and that the note had been paid. The indictment was by the court permitted to be amended, by striking out the name Benjamin, and inserting Daniel, in two places, with the consent of the defendant, which amendment and consent were ordered to be noticed in the record.

In support of the prosecution, W. R. P. Washburn testified, that on Tuesday, the 18th of September, 1827, which was the last day of service for the next court of common pleas in this county, he, at the request of Benjamin Hall, made a writ in his favor, against Warren Studley and Daniel Cutter, which writ was immediately put into the hands of James Dennie, the defendant, and served by his attaching their shop of goods, into which he put a keeper, and also by laying an attachment on their household furniture in each of their houses. This attachment was under a special direction from the plaintiff. No expense attended the keeping of the household furniture, which was left in the care of a domestic or other person in the family of the debtor. Having some doubt of the correctness of the writ, Mr. Washburn, in the course of the same day, made a second, which he gave to the defendant, and having ascertained from him, that no other attachment had been laid, he directed him to consider this second writ as substituted in the place of the first. On the Saturday following, the parties, Hall and Cutler, were at his office to settle the writ. Hall went to the defendant

to ascertain the cost of the attachment, and was told by him, that it was twenty dollars.

The counsel for the defendant objected to any parol evidence of any writ or of the service of any writ except by the record itself duly proved. This motion was overruled.

The witness then said that it was agreed by the parties that Cutter should pay the debt and service and other expenses; but that Cutter said at the time that the expenses were so much larger than he expected, that he could not pay the amount at that time. The defendant came to the office of the witness, where the parties were engaged in the settlement, and there the discharge of the attachment and a memorandum of the settlement were at that time indorsed on the writ and signed by the parties. Mr. Hall paid the defendant twenty dollars for his expenses, and five dollars to the witness for the writ. The writ was retained by the defendant, but he returned to the witness the first writ which was produced in court, and on which no service was charged. Mr. Cutter gave to Hall a due bill for twenty-five dollars, on account of the expenses which had been paid by him; but whether this was before or after the payment to the defendant the witness could not recollect. The defendant did not at that time make out a specification of the expenses; but some time after and while the subject was under the consideration of the grand jury, he put into the hand of the witness an account which he produced in court, and which was in the following words, namely:

"W. R. P. Washburn, Esq. to James Dennie,	Dr.
To fee in writ <i>Benjamin Hall v. Studley, et al.</i>	\$1 50
To extra time and custody of shop and houses of defendant, and serving writ,	8 50
To five days keeper's fee,	10 00
	<hr/>
	\$20 00

The witness had not demanded any account, and this was made by the defendant voluntarily and put into his hands. On

cross-examination he said that the twenty-five dollars were taken from a roll of bills which Cutter had paid to Hall for the debt; that he had thought that there was some incorrectness in the first writ, and that it would not be safe to rely on it; that Hall was a favored creditor of Studley and Cutter; that they were apprehensive of a demand from another person; that he could not recollect whether he gave the defendant at the time writs of summons for the defendants, and did not know whether summonses were delivered to them according to law.

Here the counsel for the defendant objected, 1. That the testimony proved that the money was paid by Cutter or by Washburn, and not by Hall; and 2. That it was paid for the service of two writs, and not of one, as alleged in the indictment. He referred to *Hoar v. Mill*, (4 Maule & Selwyn, 470,) in support of the second point, alleging that it was a fatal variance. They cited also *Dunlap v. Curtis*, (10 Mass. R. 210,) to show that no offence is committed where the fee is demanded of and paid by a person not liable to pay it; and the case of *Boswell v. Dingley*, (4 Mass. R. 413,) to show that the expense attending the levying of an execution is upon the debtor and not on the creditor. The certificate of John Stickney, clerk, was read to show that no writ was returned to the last October court, nor on its files, wherein Hall was plaintiff, and Studley and Cutter defendants. Hawkes Lincoln, jun. testified that in the course of the last summer, he put into the hands of the defendant a writ in his favor against one Frederick Conklin, with instructions to attach the schooner Sarah, which writ was served accordingly, and that soon afterwards the demand was settled. The defendant called for his fees, and produced a memorandum in which he charged twelve dollars for the keeper, eight dollars for service, and ten dollars for going to Salem on other business. The witness paid no money but gave a note or due bill for the same, which was still in Dennie's, the defendant's, hands and unpaid. On his cross-examination he could not say whether the note was negotiable. The county

attorney then read a certified copy of a judgment rendered at the last term of the court of common pleas, in this county, wherein John F. Bannister was plaintiff, and Reuben Brooks was defendant, which was dated July 5, 1807.

Jonathan Wheeler testified, that he was appointed by the defendant keeper of the goods attached in the shop of Studley & Cutter ; that he continued in possession five days, and was dismissed on the fifth, a half hour before the suit was settled ; that the defendant paid him eight dollars for the service, but refused at that time to pay him two dollars more which was due to him for that service. He admitted, on his cross-examination, that he had a quarrel with the defendant.

John F. Bannister testified, that in settling with the defendant for his services under the attachment of the property, Mr. Dennie demanded one hundred and fifty-nine dollars as the same is indorsed on the execution. That the vessel was attached on the 11th of May, was sold by consent of parties, under the management of the defendant, on the 26th of June ; that he, the witness, was the purchaser at the sum of seven hundred and forty-five dollars ; that a delay arose respecting the bill of sale, and that he gave to the defendant his receipt on the 26th of June, by which he promised to be accountable to him for the vessel, and that it was not until the 18th of July following that the bill of sale was executed ; that he originally gave to the defendant a bond to indemnify him for attaching the property, but that no suit was ever commenced against the sheriff. He did not pay any money ; the sum of one hundred and fifty-nine dollars was paid in a note which was signed by Messrs. Kittredge & Wyman, who were concerned with him in the purchase of the schooner. James Wyman testified, that this note was given by Mr. Kittredge and himself, in part payment of their proportion of the purchase of the vessel, and was paid at the end of thirty days. The writ, which was offered by the county attorney as the ground of the judgment, bore date 10th of May, 1827. On objection by the counsel for the defendant, the

court ruled that it could not go to the jury, it being set forth in the indictment that the writ was issued on the 20th of May. The evidence for the prosecution was here closed.

S. D. Parker and *C. G. Loring*, for the defendant, contended, 1. As there were two writs put into the hands of the defendant, the fees were taken upon both, and not for the service of one writ only, as alleged in the indictment. For the service of each of these writs, the defendant was entitled to the sum of two dollars and four cents, namely, for attaching goods in store of the partners one dollar, and for attaching the household furniture of each one dollar, and four cents for travel. 2. The keeping of the goods was a thing distinct from their attachment, and that no provision was made for it in the fee bill, and yet that it was most reasonable that something should be allowed to the sheriff for the risk of the goods in the hands of the keeper, and that if no more was demanded and charged by the officer than a reasonable sum for this risk and additional trouble, it could not be inferred to be a wilful and corrupt act within the statute. There is no offence without there is an intention to commit one, and a knowledge at the time that it is an offence. 3. There was not evidence in the present case that any service was completed in the case of *Hall v. Studley and Cutter*, for which the defendant was entitled to demand and receive any fee. There was no writ, and the service could not be proved except by the return of the officer upon the writ. No return is on the writ which was produced by Washburn. It was never served. It should appear, by the return on the writ, that a summons had been delivered to each of the defendants. Until a perfect service should be proved to have been made of the writ, no fee could be demanded, and if nothing was due, there could be no offence committed against this statute, according to the decision of the supreme court, in *Shattuck v. Woods*, (1 Pick. 174.) The officer has never been called upon to return or produce it. 4. There was not proof in this case that the defendant demanded his fee of Hall. Cutter was bound to

pay for the service, and actually assumed the payment on himself by giving his note to Hall for the amount. There was, therefore, no extortion on Hall as alleged, and the payment by him was a voluntary act as by a third person. If it is true that Hall was answerable for the service of the writ only, yet Studley and Cutter were bound to pay for the keeping, and actually agreed to do so. *Dunlap v. Curtis*, (10 Mass. R. 210); *Caldwell v. Eaton*, (5 Mass. R. 399.) 5. The account produced is evidence that Dennie considered Washburn as his debtor, and it was admitted that this account was not exhibited till after the money had been paid, and they insisted that the charge was for the goods and not for the service. Deducting four dollars and eight cents for the service and both writs, there will remain five dollars and ninety-two cents, which is the amount claimed by the defendant for all his trouble and risk in relation to the goods in this case, in addition to the expense of the keeper.

The counsel for the defendant then moved for leave to examine the sheriff of the county of Suffolk, his several deputies and others who had been officers, to show that they had construed the fee bill on this subject in like manner, that the attachment did not include the keeping of the goods, but was distinct from it, and that as no fee was provided for the keeping in the fee bill, they were accustomed to charge a reasonable sum for this service.

THACHER, J. The construction of the statute in this particular is matter of law, and belongs exclusively to the court. It amounts, in my estimation, to this: the defendant offers to prove that he has done no more than is done by other officers, and therefore that no crime has been committed by him. But the great object of this trial is to decide whether this practice was legal, and this depends on the construction which shall be given to the law by the court.

As to the third and last charge the counsel for the defendant contended as follows: 1. No verdict can be rendered against the defendant, because there is no writ in the case nor proof

that any such writ ever existed, as that which is mentioned in the fifth count. 2. The execution is not pursuant to the judgment: for this says that the judgment creditor should recover nine hundred and ninety-five dollars damage, but the writ of execution says, debt or damage. 3. The sale of the vessel was on June 26th, by consent of the parties, but the execution did not issue till July 5th, and no judgment was rendered till after the sale had taken place. 4: If all the facts stated in this count were true, they would not amount to an offence, because the payment was by a note, and not in money. The last objection to the fifth count, and which applied to the sixth and seventh, was that the note was part of the proceeds of the sale of the vessel, that the officer deducted it according to the precept of the writ of execution from the property to satisfy himself for his fees, and so had been paid by Brooks and not by Bannister.

Austin, for the commonwealth.

THACHER, J., instructed the jury substantially as follows. The offence of extortion, in its proper sense, signifies any oppression under color of right; but it signifies, more strictly, the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. The indictment is founded on the sixth section of the statute of this commonwealth, prescribing the fees of certain officers, which enacts "that if any person shall wilfully and corruptly demand and receive any greater fee or fees for any of the services aforesaid, than are by this act allowed and provided, he shall forfeit thirty dollars for every offence, with costs." So that the defendant, standing charged in this indictment of three several offences, will be liable on a general conviction to the penalty for each. But it is for you to try him on each, and to find him guilty or innocent of all or either of the charges according to the evidence. The government must strictly prove the offences as alleged. It may be that the defendant has received more fees than he was by

law entitled to have, and yet he may not have offended in the manner alleged in any count of the indictment ; he may be liable at common law, and not under this statute.

Various principles, which have been settled by the decisions of the supreme court of this commonwealth, or well settled in books of competent authority, apply to this case. 1. To subject an officer to the penalty prescribed in the statute, it must be proved, that the sum alleged to have been by him extorted, was demanded as a fee for some official duty, for which a fee is prescribed or allowed in this statute. 2. When an officer, under color of his office, exacts a fee, where no service has been rendered, or where no fees are due, it is a case of extortion at common law, for which he may be indicted and punished. (Co. Lit. 368, b.) *Shattuck v. Woods*, (1 Pick. 171.) *Runnels v. Fletcher*, (15 ib. 525.) But the extortion to be punished by a penalty against an officer who receives more than lawful fees by color of his office, supposes a right to demand fees of the person who pays them. The excess demanded and taken is then extorsive, and is punished by the penalty in this statute. *Dunlap v. Curtis*, (10 Mass. R. 210.) 3. But if the fees are demanded of a person who is not liable to pay them, or if they are voluntarily paid by a person, who is not liable to pay them, although the same may have been improperly and unjustly taken and accepted by the officer, and although in certain cases he may even be punishable for the fraud at common law ; yet this would not, according to the case of *Dunlap v. Curtis* be extortion, because the fees, if excessive, are not obtained by the officer by color of his office. 4. It is true also generally, that the voluntary payment of a greater sum, where a less is due, cannot be denominated extortion ; the offence consists in unlawfully extorting money, which supposes that it is paid unwillingly, and by constraint. It is no offence for an officer to accept what one presents to him as a mark of gratitude or to insure his greater diligence. (Viner, Extortion, A. 5 ; 1 Russell on Crimes, 222.) 5. Though the indictment

must state a sum which the defendant received ; yet it is not material to prove the exact sum as laid. It will be sufficient, if any sum is proved to have been unlawfully received. 6. It is settled, that in an indictment for extortionally receiving money, if it is not proved that the money was paid, but only that a negotiable note of hand was given by the debtor, or party liable, which note had not been paid, it will not be sufficient to authorize a conviction ; for the note may be avoided, certainly in the hands of the promisee. It is *ipso facto* void, because of the illegal consideration. *Commonwealth v. Cony*, (2 Mass. R. 523.) But I am not prepared to say, nor has it yet been settled, that if an officer should accept a note for illegal fees, and the debtor should afterwards pay the amount to the officer, and he should receive it, that this would not be a case of extortion. The demand of the unlawful fee, the note and payment seem to me one continued act, which would amount to extortion within the statute. I am not at present able to see, why the intervention of the note should alter the character of the thing on the part of the officer. 7. If a greater sum than the law allows is demanded and received by mistake for an official duty, as for example, through a mere error in computation, the guilt of extortion will not be incurred. Because the statute supposes the demand to be wilful on the part of the officer, and a constraint on that of the debtor. *Commonwealth v. Shed*, (1 Mass. R. 227.) But if the money was demanded and received under a claim of right by the officer knowingly, and paid by the debtor in consequence of that demand, and under an idea that he was obliged to do so, it would bring the case within the statute, and make it a wilful and corrupt act. 8. It was admitted, by the counsel for the defendant, with candor and propriety, that he could not allege usage in his defence ; for no usage, however long continued, will sanction an act which is done in violation of law. The practice of other officers is not legal evidence to protect the defendants, nor is their construction of the law to be the rule. It is the highly responsible duty of the court to declare the true

construction of a statute, and not for those on whom the statute is to operate, and for whose government it is intended. For if a wrong construction put upon the fee-bill by officers generally would justify an act done in violation of its letter and spirit, the law would become a dead letter, and wholly inoperative. I therefore excluded all evidence of officers or of others, who were called to testify to what construction they had put upon the act, there being but one true construction, which is to be pronounced by the court. Such decision appears to me to be the more proper, inasmuch as the fee-bill was enacted to restrain and regulate officers, and to protect the citizens from all oppression under color of office.

In the application of these principles, you will see that the defendant is entitled to be acquitted on the third and fourth counts, which relate to the taking of an unlawful fee from Lincoln. For no money has been by him paid to the defendant. A note or due bill has been given, but not paid, and according to the decision in Cony's case, the offence has not been consummated. The three last counts in the indictment relate to the alleged extortion in the case of Bannister. It is a sound maxim of law, that the offence must be proved as alleged, and that the proof must follow the declaration. In the fifth count it is set forth, that on the 20th day of May, Bannister purchased the writ of attachment, on which the judgment issued on the first day of the following July term of the common pleas, and on which the execution was issued in his favor against Reuben Brooks ; and that for his services and expenses in the premises, as well of the said writ as of the said execution, the defendant did wilfully and corruptly demand and receive of said Bannister, one hundred and sixty-one dollars. On the production of the writ, it bore date the tenth day of May, and was therefore rejected from the evidence. For wherever a judgment is alleged in the declaration, it should also be proved. Where the very ground of an action is misstated, as where you aver a writ which issued at a certain time, and no such writ can be shown,

it will be fatal. And as no writ appears in this case, there can be no conviction on the fifth count. *Savage v. Smith*, (2 Bl. R. 1101.) It is averred, in the sixth and seventh counts, that the defendant wilfully and corruptly demanded and received the sum of one hundred and sixty-one dollars of Bannister. Now it appears, by the evidence, that the defendant deducted his fees from the proceeds of the sale of the vessel, which belonged to Brooks, the judgment debtor. And although it is true, that a less sum was on this account paid to Bannister, yet the judgment and execution remain in full force in his favor against Brooks for the balance of his debt which remains unpaid. Now if this fee of one hundred and sixty-one dollars, or any part of it, was unlawfully charged and taken, the wrong was done in estimation of law to Brooks. It was a deduction from his property, which was in the possession of the defendant; and therefore, if the fees were unlawfully taken, they were extorted from Brooks and not from Bannister.

Further, where the property of a debtor has been attached and sold on execution, the expenses of the keeping and sale and likewise the fees for the levy are a charge to the debtor, where the property is sufficient for the purpose, and not to the creditor. Bannister being in this case the creditor, and the debtor's property being sufficient, he was not liable for these expenses; and if under these circumstances he paid them, it was a voluntary payment on his part, and so not extortion in the defendant. I give no opinion on what would be the character of this transaction, if the charge should be, for wilfully and corruptly demanding and receiving this money of Brooks. It is enough, for the present case, that the money has not been extorted from Bannister. Upon the first charge, which was contained in the two first counts of the indictment, you will consider that the counsel for the defendant admit that their client received five dollars and ninety-two cents over and above any charge for the service of the writ and the expense of the keeper, and that the defendant, in his memorandum which he

gave to Washburn, admits that he charged eight dollars and fifty cents for his extraordinary services in relation to the attachment of Studley & Cutter's goods. Had the defendant a right by law to any extra compensation for his services in this case? The fee-bill was intended to limit the compensation of officers. It is not according to the genius of our systems to provide a liberal compensation for public servants; still, however, the legislature intended to allow such fees as would be sufficient to secure to the public the service of good men. The bill allows fifty cents for the service of a writ on each defendant whose property is attached. In the great proportion of cases the property attached is nominal, and nothing is done by the officer but to leave a summons at the last place of the party's residence, and to return the writ to the court. No provision is made, allowing to the officer a greater fee for attaching property, where from the amount great care is requisite on the part of the officer, and it is attended with risk. For the trouble and risk attending the arrest of the body of a debtor, and carrying him to prison, or holding him to bail, the law allows only fifty cents. But it is insisted by the defendant's counsel that the attachment of property is one thing, and the keeping is another. I cannot yield to this construction of the law. The attachment must include the taking of the property into the safe possession of the officer; otherwise the creditor would have no security. Still the actual expense of transportation and storage are allowed to be charged by the officer. A different construction of the law would put it into the power of every officer to set a value on his own services which would expose the citizens to exactions, and tend to annihilate the provisions of the fee-bill. A like construction was given to this statute by the supreme court in the case of John Vinal, who was tried at the March term of that court in this county in the year 1800. Mr. Vinal was indicted and convicted for the offence of extortion, in wilfully and corruptly demanding and receiving in his office of a justice of the peace, from one James Murphy, five dollars for taking and certifying

the recognizance of said Murphy for his appearance at the next supreme judicial court, to answer for the offence of perjury, when by law he was entitled only to twenty-five cents. Vinal, in his defence, which was conducted by John Lowell, contended that he charged only twenty-five cents for the recognizance, and four dollars and seventy-five cents for his extra trouble in going from his office to the jail, where Murphy was confined at the time, and there taking the recognizance. But Dana, Ch. J. and all the other judges instructed the jury, that this was not a sufficient justification, that it was Vinal's duty to take the recognizance, and if he might charge anything for extra services, he might extend his demands to an unreasonable degree, and so defeat the fee-bill, the object of which was to protect the citizen from unreasonable exaction, while it allowed a reasonable compensation to the officer for his service. The same opinion is expressed in the case of *Shattuck v. Woods*, (1 Pick. 171.) And I see no difference in principle between the case of Vinal and the present.

But it is contended in this case for the defendant, that there is not legal evidence of any service of the writ, because the writ is not produced in evidence. If the writ were in the power of the government, I should consider this objection deserving great weight. But the evidence shows that it is in the possession of the defendant, who might produce it, and probably would produce it, if it would avail in his behalf. In this absence of the writ, you may fairly presume, that if produced, it would prove a legal service by the defendant, pursuant to the precept. So likewise it is for you to settle whether the charge was for two writs, or whether the second writ was substituted for the first. In all cases, the officer may rightfully demand of the plaintiff creditor his fee for serving a writ, and in the present case, Hall was legally responsible to the officer for his fee. It was competent for the parties to a writ to settle this matter between themselves; and in this case, it was agreed between them, that the debtors should pay all the expenses. But

Commonwealth v. Read.

the defendant was no party to this contract, and he could look to Hall only, who actually paid to him the amount. It has been proved in the case that the defendant demanded twenty dollars of Mr. Hall; and it is for you to determine, by your verdict, whether it was paid by him in consequence of that demand, and under a supposed obligation, or whether it was a mere voluntary gratuity on his part, in which last case the defendant would be entitled to your verdict of acquittal.

The jury found the defendant guilty of the first charge, which was contained in the two first counts of the indictment, and not guilty of the remainder. He was fined thirty dollars and costs of prosecution, from which judgment he appealed to the next supreme judicial court, and recognized according to law to prosecute his appeal.¹

MARCH TERM, 1828.

COMMONWEALTH v. JOHN READ.

Where an indictment is signed by a juror, and it does not appear that he signed it as foreman, it is competent for the court to examine the records, to determine who was the foreman; and if such juror was the foreman, the indictment will be deemed good.

Where the statute of 1800 required the grand jury, appointed to serve at the supreme judicial court for the county of Suffolk, to serve at the municipal court also, and the municipal court commenced its session on the third day of March, and the supreme court commenced its session on the fourth day of the same month, — and the municipal court was adjourned to the tenth day of the month, in order that the grand jury of the supreme court might serve at the March term of the municipal court; it was held, that this was no reason for arresting a judgment, founded upon an indictment for an offence committed prior to the finding of the indictment.

¹ This appeal does not appear to have been tried.

Where, upon the trial of an indictment for forging and uttering a counterfeit bank bill, purporting to be the bill of a bank in the state of New York, a copy of the act of incorporation of such bank, and of a part of another additional act increasing the capital of the bank, certified by the deputy secretary of state, under seal of the secretary's office, together with a certificate of the lieutenant-governor, under the privy seal of the state, that the same was authenticated in due form, and by the proper officer, was offered in evidence; it was *held*, that both seals were seals of the state of New York, within the meaning of the act of congress of March, 1790; and that the evidence might go to the jury, open to any objections arising from the whole of the additional act not being produced.

It is competent to prove, by parol testimony, the existence and acts of a corporation in another state.

Upon the trial of an indictment for forging and uttering a counterfeit bank-bill, the cashier of the bank, from which such bill purported to be issued, was *held* to be a competent witness to the forgery.

THE prisoner was indicted for forging and uttering, on the 16th of February, 1828, a certain promissory note, dated February 11, 1828, payable at the Mechanics Bank of the city of New York, to Thomas Freeman, or order; signed by J. Lorillard, president, and John Fleming, cashier, and drawn with intent to defraud Francis W. Dana, of Boston. The indictment contained five counts, upon four of which the jury found the prisoner guilty.

Austin, for the commonwealth.

A. Dunlap and *S. D. Parker*, for the prisoner.

After verdict, a motion was made by the prisoner's counsel in arrest of judgment, and for a new trial. The causes assigned on the motion in arrest of judgment were as follow:

1. Because the indictment was not signed by the foreman of the grand jury in that capacity. Edward Motley, who had been duly appointed foreman, had signed his name at the end of the indictment, after the words "a true bill," but without adding to his signature "foreman," as is usual. The prisoner's counsel, in arguing the motion, denied that the court could go out of the record, or that they could know that the indict-

ment was signed by Edward Motley, the foreman. 7 Dane's Abr. 652; *Prescott v. Tufts*, (7 Mass. R. 209); *Fowler v. Shearer*, (ib. 14); Com. Dig. A. Indictment; Cro. Eliz. 751.

THACHER, J. I am of opinion that it is competent for the court to look into the records of the court, to ascertain who were the grand jurors, and who had been appointed their foreman. This indictment was returned into court by the grand jury on the 12th of March, 1828, and purported to be found by them. It was signed by Edward Motley, who appeared, by the records of the court, to be their foreman. Had the signature of the foreman been wholly omitted, it would have wanted the usual verification. In a capital trial at Northampton, in 1813, before Parsons, Ch. J., Sewall and Jackson, and after a verdict against the prisoner, a motion was made in arrest of judgment by the prisoner's counsel, because no foreman had been appointed by the court, or elected by the jury. The person who answered as foreman of the traverse jury, acted without authority. The court, after consideration, refused the motion on the ground that the verdict was the act of the jury, and that the appointment of a foreman, though usual, was not material.

In the case of the *Commonwealth v. Parker*, (2 Pick. 550,) after verdict in a capital case and a motion in arrest of judgment, because one of the grand jurors who returned the indictment had not been duly returned, the court looked into the case and permitted the officer to amend his return, and it was so made to appear that the juror was in fact legally chosen and returned. In the present case, I think that no amendment is necessary, because it is sufficiently apparent that the indictment was returned by the grand jury, and that the omission of the word foreman is not material.

2. The second cause assigned for arresting the judgment was that the grand jurors who returned the indictment had no legal existence or authority on the first Monday, being the third day of March, on which the court was holden.

THACHER, J. As to this point, it will be seen that by the act of

1800, c. 44, the jurors appointed to serve on the grand jury, at the supreme judicial court in the county of Suffolk, are required by law to attend the municipal court, and are vested with all the powers belonging to the grand jurors, touching all matters within the jurisdiction of the court. The supreme judicial court commenced its session in the county of Suffolk on the first Tuesday, being the fourth day of March. The former grand jury could not have performed the duty; because if they had been summoned to attend the municipal court at this term, their powers would have ceased on the first day of the session. It is therefore usual, in such cases, to adjourn this court to a day subsequent to the commencement of the supreme court, which was done in this case, and the jurors, who had been empaneled at the supreme court on the first Tuesday of this month of March, duly appeared, and were empaneled and sworn to serve in this court, on the second Monday, being the 14th day of the month, at which time Edward Motley, one of their fellows, was appointed foreman. This indictment was returned into court on the third day of the session, being the 12th day of March, and duly filed. I am aware that the whole term of a court is, in legal contemplation, but one day, and that all allegations and entries which are of the term generally, have relation to that which is the first day of the term. (Starkie on Evidence, 1400.) It is also well settled that if a bill is entitled generally of the term, it relates *prima facie* to the first day of the term, and if the cause of action does not arise till afterwards, the defect is fatal. But the true time of filing the bill may be shown, and if the cause of action is prior thereto, though after the commencement of the term, judgment will not be arrested nor reversed on error. If, however, it should appear in evidence that the cause of action arose after the suit was commenced, the plaintiff will be nonsuited. (Yelv. 71 a, note 2, Metcalf's Ed.) This is the established doctrine in civil cases, and I consider it applicable to indictments. If it should appear, on the face of an indictment, that it was found prior to the commission

of the offence alleged, it would be a fatal error. But that objection is not applicable to this case. The forgery is alleged to have been committed on the 6th day of February, 1828, prior to the term of this court. It appears, by the record of this court, that the present indictment was returned by the grand jury and filed in this court, on the 12th day of this present month, so that the true time is made known to the court by the highest evidence. Our laws are of so mild character, that it is not the duty of judges to allow a defect in point of form, in a matter not material, to vacate a verdict where substantial justice has been done. The habit of yielding to objections of this kind by judges in England, has been one effect of the severity of their penal codes, which has punished, in time past, almost every felony with death. As therefore it appears to me in this case, that this indictment was in fact returned by grand jurors, lawfully empaneled and sworn, and that it is sufficiently verified, the motion in arrest of judgment ought not to prevail. (1 Chitty C. L. 202.)

The causes assigned for a new trial were as follows: 1. In allowing certain acts of the state of New York to be given in evidence which were not legally certified. The acts were certified by Archibald Campbell, "deputy secretary," under the seal of the "secretary's office." To this was added a certificate of Nathaniel Pitcher, governor, under "the privy seal of the state," "that the same was authenticated in due form and by the proper officer." The objection was that it did not appear that either of these was the seal of the state, according to the act of congress, passed March 26, 1790. (2 U. S. Laws, Ed. of 1815, c. 38, p. 102.) But the court deemed the seal to be sufficient, considering that the seal of the secretary's office was, in fact, one of the seals of the state, and that the privy seal was another, and that it was not material what name was given to the seal, since a state might have several seals for different purposes with distinct names. But the certificate purported that the papers were "a true copy of an act and part of an act," and it was contended for the pris-

oner that the whole act should be shown. But the court decided that the evidence might go to the jury, open to any objections arising from any apparent defect, and that it was competent for the prisoner's counsel to produce evidence to show that anything material was omitted ; but that this evidence applied only to the fifth count ; so that even if the objection had been sustained, judgment would still have been rendered on the first, second and third counts, which were fully proved in evidence and without the aid of these acts.

2. The second cause assigned for arresting the judgment, was because the court permitted a paper to be given in evidence to the jury under the fifth count, purporting to be a genuine promissory note, issued by the president, directors and company of the Mechanics Bank, in the city of New York, before it was proved that it had been issued by the order of said corporation by evidence of a written record ; and because the court permitted parol evidence to be given of a written record of such order, the record not being lost. In the eighth section of the charter it is enacted, "that all bills or notes, which may be issued by order of the said corporation for the payment of money to any person whatever, or his order, or to bearer, though not under the seal of said corporation, shall be binding and obligatory upon the said corporation, in like manner and with like force and effect as upon any private person, if made by him, and shall be assignable and negotiable in like manner as if made by such private person." It was contended, by the prisoner's counsel, that no order of a corporation could be proved but by a written document. John Fleming, the cashier of the Mechanics Bank, had testified, that by a vote of the directors post notes of the bank might be issued by the president and cashier, when they should be wanted ; and that the original genuine post note in this case, which had been since altered from \$120 to \$10,000, was issued in due course ; that an abstract of it remained in the bank on a sheet of paper, from which it was cut ; and that all the books and records of the

corporation, as well as this written abstract, were at the bank in the city of New York. But the court decided, that by the practice in this commonwealth it was competent to prove by parol testimony the existence and acts of a corporation in another state ; inasmuch as the officers and records of such corporation are not within the power or subject to the process of this court ; that the order of the directors for issuing post notes and other bills of the bank, was designed for the justification of its officers and agents ; and that a bill or note issued by those officers, would bind the bank in the hands of an innocent holder, even if no written note or order of the directors or of the corporation could be produced, showing that they had directed it to be issued, the bank being liable for the acts of its officers.

The last cause assigned in arrest of the judgment, was that the cashier of the bank was admitted to testify to the forgery, although an objection was taken to his competency at the trial. The counsel for the prisoner contended that he had an interest to prove, that the note was a forgery, and that a person in his situation was incompetent. But the court stated that although in England, a person whose name has been forged is not a competent witness to prove that fact, yet that the rule of exclusion was considered by eminent judges in that country as an anomaly. *Rex v. Boston*, (4 East's R. 582) ; *Bent v. Baker*, (3 T. R. 27) ; *Smith v. Prager*, (7 T. R. 60.) But that in this commonwealth such person has always been deemed a competent witness, and not interested in the event of the trial ; because if the party should be convicted, the record could not be used in the trial of a civil action, which should be brought to recover the contents of the instrument.

The motion for a new trial was overruled, and the prisoner was sentenced to suffer fifteen days solitary confinement, and eight years hard labor in the state prison.

APRIL TERM, 1828.

COMMONWEALTH v. VINSON CHANDLER.

To counterfeit any writing of a private nature, with a fraudulent intent, and whereby another may be prejudiced, is forgery at common law.

To forge a note or other private instrument in the name of a fictitious person, and for the purposes of fraud, is forgery under the statute.

Where an indictment alleged, that the defendant, contriving and intending to deceive one S. G. P. and to induce him to employ the defendant, and to pay him a large sum of money as wages, exhibited and delivered to the said S. G. P. a certain pretended certificate of good character, it was *held*, that this did not constitute forgery.

THIS was an indictment for forgery at common law. In the first count the offence was charged as follows, namely: That the defendant, on the 17th of March, 1828, did utter and publish as true to one Samuel G. Perkins, a certain false, forged and counterfeit certificate, purporting to be a certificate of one Mary Eaton, of the character of him, said Vinson, with intent to induce the said Samuel to retain and employ the said Vinson as a domestic in said Samuel's family, at a stipulated rate of wages, and thereby to cheat and defraud the said Samuel, which certificate is as follows, to wit: "March 17, 1828. This is to certify that Vinson Chandler is a good young man, attentive to his duties and a good disposition young man as I wish to have in my family. Mrs. Mary Eaton, Pearl street, Boston." And that he, said Vinson Chandler, then and there well knew the said certificate to be false, forged and counterfeit, against the dignity of the commonwealth.

The second count set forth that the said Vinson Chandler, on said 17th of March, contriving and intending to deceive Samuel G. Perkins, Esq., one of the good citizens of this commonwealth, and to induce him to employ and retain the said

Vinson in his service, and to pay him a large sum of money as wages, from month to month, did exhibit and deliver to said Samuel a certain false and pretended certificate of one Mary Eaton, purporting to be the certificate of said Mary, that he, said Vinson, was attentive to his duties and of a good disposition, and which said false and pretended certificate is as follows: (as in the first count,) which said certificate he, said Vinson, then and there well knew to be false and pretended, against the peace of the said commonwealth. Upon the prisoner's arraignment, he pleaded guilty, and the court took time to consider the sufficiency of the indictment. Upon the 12th, he was brought into court, and ordered to be discharged.

THACHER, J. The first question which arises upon this record, is whether judgment can be rendered against the defendant as for forgery, at common law? If judgment cannot be rendered as for a forgery, is any offence sufficiently described, to authorize a judgment to be rendered against the defendant, as for a misdemeanor?

1. Forgery at common law is, in this commonwealth, as in England, a misdemeanor. For a long time, this offence at common law was limited to the false fabrication of instruments of a public nature, or to those of peculiar solemnity, as records, deeds, wills and other instruments under seal: and it was doubted whether it extended to promissory notes of hand, acquittances and other private instruments prejudicial to individuals. But it was settled by *Ward's case*, (12 Geo. I.) and for more than a century, it has been established law, both in England and in this commonwealth, that to counterfeit any writing of a private nature, with a fraudulent intent, and whereby another may be prejudiced, is forgery at common law. (Baçon Abr. tit. Forgery. B; Russell on Crimes, 1467; 2 Lord Raymond, 1462.) In the case of *Henry Reed*, who was tried at this present term, for altering two forged promissory notes of hand for the payment of money, in the name of James Smith, it appeared, at the trial, that no such person as James Smith

was in existence ; and upon that ground it was denied by D. A. Simmons, Esq. the defendant's counsel, that the offence was a forgery within the statute of 1804, c. 120. The indictment concluding "against the peace and the form of the statute," &c. a general verdict was, under my instructions, found against the defendant. Upon looking at the authorities, it appeared to be well settled, that to forge a note or other instrument in the name of a fictitious person, and for the purpose of fraud, is a forgery under the statute in England, and undoubtedly is so by the statute of this commonwealth. (Russell on Crimes, 1426 ; *Anne Lewis's case*, Foster's Crown Law, 116.) Fraud and deceit are the chief ingredients of forgery, whether by statute or at common law : it is not essential to the offence, that any person should be actually injured, but there must be the intent to deceive : it cannot, therefore, be material, whether the fraud should be effected, by using the name of a real or of a fictitious person. Simmons did not afterwards prosecute his motion, and Reed was sentenced under the statute.

2. If it had been alleged in this indictment, that the defendant fabricated or uttered the false certificate in this case, with the evil intent to be retained in the service of Samuel G. Perkins, that after being so retained, he might fraudulently convert to his own use the money or goods of said Perkins without his knowledge, and against his will, I should have considered it a misdemeanor, and upon conviction, either by verdict or confession, he would be punishable for the offence : because this would show an actual intention to defraud, coupled with an act done in pursuance of such unlawful intent.¹ Such evil design

¹ Salk. 375. Unless the falsity tend to the prejudice of another's right, it is not forgery. Where the obligee of a bond lessened the sum in the obligation it was considered to his own prejudice, and not forgery, Noy, 99. It was held by the twelve judges, in the case of *Parkes and Brown*, (East, P. C. 964,) that where one uttered his own note, but in the name of another, and as the note of that other, it was forgery ; and it being in the same name as his own, could not make any difference.

is not charged in either of the counts of this indictment. For it does not follow, that because the defendant meant, as is alleged in the first count, by uttering this letter, to induce Perkins to retain and employ him as a domestic servant, that he had the further unlawful design to defraud Perkins of his money or goods. He might have adopted this course to get into the service of a good master, and it is not impossible, although the act was extremely indiscreet, that he might have intended to be a faithful servant. The intent, as alleged in the second count, was to "deceive Mr. Perkins, and to induce him to employ and retain the defendant in his service, and to pay him large wages from month to month." But it is not alleged that the defendant was not capable of making a good servant, or of deserving and earning large wages ; nor that he did not possess such character as is described in the writing, and therefore it does not follow, from anything alleged, that Perkins would necessarily have been prejudiced by taking the defendant into his service. The paper is a false token : and if by the unlawful use of it, the defendant had defrauded any one of his money or goods, it would have been a cheat, and he would have been subjected to a heavy punishment. Being, for these reasons, of opinion that this instrument does not come within the description of any of the instruments which are enumerated in the statute, nor within any case of forgery at common law, and that no sufficient offence is described in either count of the indictment, the judgment must be arrested and the prisoner be discharged.

The prisoner was discharged.

MARCH TERM, 1829.

COMMONWEALTH v. ORIGEN BATCHELDER.

If an objection is taken to a witness on account of his religious sentiments, such sentiments should be proved by other witnesses.

A person believing in the being of God, and in his attributes, as a righteous avenger of wickedness, and in the existence of a future state, is competent to be sworn as a witness.

Where the editor of a sectarian newspaper publishes an obituary notice, in which it is stated, that the deceased never used profane language, the intention of the notice being to promote certain religious views; it is the right of the editor of another sectarian newspaper, if he believes such notice to be injurious, to state in his newspaper, that the deceased was a profane swearer, if such was the case, and if such statement is made simply to counteract what is believed to be the mischief of the notice.

THIS trial commenced on Monday, the 9th of March, and occupied two days. The principal facts and points will appear in the following address of the judge to the jury.

Austin, for the commonwealth.

The defendant *pro se*.

THACHER, J. The defendant is on trial before you for the alleged offence of having maliciously composed, printed and published, in a certain newspaper, called The Anti-Universalist, of and concerning one George B. Beals, deceased, the following false, scandalous and defamatory words, namely: "Now we, (meaning said Origen,) are authorized to say, that that very person (meaning the said George, deceased,) instead of being an example to others, and being free from the use of profanity, was actually habituated to it, (meaning profanity,)" with the evil intention to defame the memory of that person, and to wound and injure the feelings of his surviving friends and relatives. To constitute the malice of such a publication on the part of

the defendant, you must be satisfied, that it flowed from a wicked and corrupt motive. From the apparent small importance of the occasion of this trial, I had not expected that it would have consumed much time, or given rise to questions of a grave character. But as it has led to discussions bearing upon religious freedom and the rights of the press, we cannot do otherwise than give to it deliberate consideration. You will naturally inquire, in the first place, what is the law of libel in this commonwealth, in relation to the present case, and whether it is libellous to publish of another, that he was habitually addicted to profanity.

A libel is a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of the dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule. *Clap's Case*, (4 Mass. R. 168.) Verbal slander is regarded in law in no other light than as a civil injury, because it is evanescent in its nature, and confined in its extent. But written slander, being more permanent, calculated to have a wide circulation, and to make a deeper impression, is regarded as an offence to the public, for which not only the party injured may have his civil action for redress, but the offender may be indicted for the supposed breach of the peace. "Expressions which tend to render a man ridiculous, or lower him in the esteem and opinion of the world, would be libellous if printed, though they would not be actionable if spoken." (2 Kent's Com. 13.) To publish of another, that he is a profane man, or that he habitually allows himself in profanity, is a libel; for by profanity is usually understood profane cursing and swearing, the irreverent use of sacred names or things in common discourse; and to say of another, that he is habitually profane, is to impute to him the habitual disregard of the name and attributes of Almighty God, and of the doctrines and precepts of our religion; because no one who fears God, and regards the holiness of the christian Character, will allow himself in this im-

pious habit. We may, in our passion and infirmity, speak unadvisedly and even profanely, but no good man will allow himself in such a practice. But the habitually profane man is not only an impious contemner of religious obligation, but of human law. Our legislature has expressed its sense of this practice, by subjecting persons guilty of profane cursing and swearing, to severe penalties. (Act of 1798, c. 33.) Although formerly it was the law of this commonwealth, that the truth of the libel could not be given in evidence, and in justification of the libellous matter; yet, by a late act of the legislature, (1826, c. 107,) the truth may now be given in evidence in all prosecutions for libels; "but such evidence shall not be a justification, unless on the trial it shall be made satisfactorily to appear, that the matter charged as libellous was published with good motives, and for justifiable ends." Now, because the legislature has chosen to alter the old law, and to furnish a new mode of defence in cases of this kind, we are not to be less careful of the character of the dead or of the living; and where a person, actuated by malice, and without good cause, endeavors to fix a stain upon the memory of the dead, or upon the character of the living, he still must be regarded as an offender, and suffer the penalty of his offence. What is a libel, is the same now as before the passing of this act. And where the defendant attempts to prove the truth of the libel, a jury is bound, not only to inquire, whether he has satisfied them by evidence of the truth of the libellous matters, but also whether he published it with good motives, and for justifiable ends.

In this case you will inquire, 1, whether George B. Beals, the deceased, was actually habituated to profanity. If so, 2, has the defendant shown a good motive which influenced him to publish that fact of the deceased? And 3, was it for a justifiable end? For it may be true, that the deceased did allow himself habitually in profanity; and yet, the defendant may not have been actuated by a good motive in publishing it, at this time, in violation of that rule, which has been reduced to an

Commonwealth v. Batchelder.

axiom, to speak nothing of the dead but what is good ; — and even, if the defendant thought himself actuated by a good motive, he may still have erred in his object, and you may be fully satisfied, that his end was wholly unjustifiable. The burden is on him to prove strictly not only the truth of the libellous matter, but the goodness of his motive, and the justifiableness of his end. The law of libel in this commonwealth now conforms to the principles which govern the subject in the state of New York ; and therefore I may with propriety refer you to the observations of their distinguished jurist. (The judge here read from 2 Kent's Com. 19.) To prove the charge against the defendant, the county attorney first read a piece which appeared in a religious newspaper, called the "Trumpet and Universalist Magazine," of January 10, 1829, which is as follows, namely : "Died, on Sunday, 28th ult., George B. Beals, aged nineteen, son of Mr. E. C. Beals. He was a pattern for the imitation of the rising generation. He was one who always detested the vice of drinking ardent spirits ; he never allowed himself to use vulgar or profane language, and avoided the company of those who did ; he was modest and genteel in his deportment, and gained the love and affection of all who had the pleasure of knowing him. He never professed any particular tenet of religion, but listened to all. His sickness was long and tedious. He had many friends who felt anxious for his future fate, and often inquired whether he was prepared for a future state. He invariably answered them, I know of no action of my life which causes me the least anxiety ; and God's above the devil, what have I to fear ? He died as he lived, sensible to the last, full of faith and hope."

The county attorney next read from a religious newspaper, of which the defendant admitted himself to be the editor, called "The Anti-Universalist," of January 21, 1829, the following piece, viz.

"*Veracity of the Trumpet.* The Trumpet of the 10th inst. contains an obituary notice, in which its subject is represented

to have been a pattern for the imitation of the rising generation, free from the use of profane language, a non-professor of any particular tenet of religion, and as saying invariably in his sickness to those who inquired respecting his preparation for the future state, that God was above the devil, and that he had therefore nothing to fear. Now we are authorized to say, that this very person, instead of being an example to others, and being free from the use of profanity, was actually habituated to it; that he was known to believe in universalism; that on his death-bed, instead of saying that God was stronger than the devil, he renounced Universalism, and gave evidence of a gracious change. By the foregoing, the public will learn to receive the obituaries of the Trumpet with many grains of allowance. As soon as time will permit, we intend to take a general survey of that publication."

Ephraim C. Beals, William Wilkins, and Robert Smith were then sworn and examined as witnesses to show that the defendant was actuated by a particular malice towards the deceased to extend the circulation of his paper. The two first of these witnesses testified, that the defendant, when asked the cause, assigned as a reason for the publication, "that he wanted to bring his paper into notice." Robert Smith heard the defendant use such an expression, but did not know in what relation it was uttered. But James Ellis and George Wheaton, witnesses on the part of the defendant, and both present at the time, testified that they heard no such expression. All the witnesses agree that when the defendant was asked by E. C. Beals to give the name of the author, he replied, that he deemed it improper to give the name in that way; but that if they would demand the name in the Trumpet, he would give it, because the matter now belonged to the public. I cannot see that there would have been any impropriety in the defendant's giving the name of the author to Beals, the father. In refusing to give the name, he assumed upon himself the responsibility of the publication, which he had a right to do. But in refusing to give

Commonwealth v. Batchelder.

the name of the author, except through the medium of the paper, and on a public demand, it does not necessarily follow that the defendant was actuated by malice towards the memory of the deceased. Of that, however, it is your province to decide.

In the course of the examination of some of the witnesses, much time was spent in inquiries as to the extent of their religious belief. I confess that I have always been desirous to exclude from this hall all inquiries which have a tendency to excite a sectarian or party spirit either in religion or politics. Good men will differ on these points, and their passions will insensibly become enlisted in the controversy. It is the duty of courts to assuage the violence of party spirit, and to administer justice with an equal hand. To withhold equal civil privileges from any of our citizens, however they may differ in their speculative views of religious faith, seems to me to be against the spirit of our institutions. Objections to witnesses arising from defective or erroneous views of religion, ought to go to the credibility rather than to the competency of a witness; and in conformity with this sentiment, where it was objected to a witness, that he did not believe in the existence of a future state, on account of his professed declarations to that effect, our supreme judicial court still admitted him to testify, considering the objection as applying to his credibility, and not to his competency. *Hunscow v. Hunscow*, (15 Mass. R. 184.) Errors in speculation insensibly creep into the mind, having their origin in our virtues as well as in our defects; sometimes arising from education and example, sometimes from pride and vanity. Some men think it the part of wisdom to doubt everything, while others deem it meritorious to believe even in impossibilities. It is best to leave them all to the corrections of reason, and to the sure influence of time, "which, while it dissipates the errors of opinion, will not fail to confirm the decisions of truth." It is well settled, that atheists and such infidels as profess not any religion that can bind their consciences to speak the truth, are excluded from being witnesses. But every per-

son who believes in the obligation of an oath, whatever may be his religious creed, whether Jew, Christian, Mahometan or Pagan, is an admissible witness; and may testify in a court of justice, being sworn according to that form of oath, which, according to his creed, he holds to be obligatory.¹ It may justly be doubted, whether it is not wholly inconsistent with the rights of conscience, to compel a man to disclose his opinions on religious subjects, inasmuch as they are matters between his conscience and his God. If, from his veneration to truth, he should avow the belief of a sentiment which would render him unpopular or odious to his fellow-citizens, or to any class of them, or which would tend to his disgrace or injury, it would be to criminate or bear witness against himself. If, therefore, an objection is taken to a witness on account of his religious sentiments, it is very reasonable that these should be proved by other witnesses; and I cannot but regret that I allowed any of the witnesses, who have been examined on this trial, to be interrogated on these points, with a view to their own disqualification, and with my present views of the law I should not allow it to be done again.

In the case of one of the witnesses, Ephraim C. Beals, it was attempted to be shown, that he ought not to be sworn for the alleged ground that he did not regard the sanctions of an oath. His son, Edward L. Beals, was offered as a witness to disqualify his father in this respect. This young man stated that he left his father's house when he was about four years old, and it was very apparent, from his own account of himself, that he had had but a slight opportunity to form a correct judgment of his father's opinions on religious subjects. The witness, however, stated, that from a conversation which he had with his father at the time of his brother's death, he inferred that he did not believe in the punishment of the impenitent in a future state; but he professed that he was not able to detail the particulars of

¹ 1 Phillips on Evidence, 19; *Omichund v. Barker*, (Willes's Rep. 538.)

Commonwealth v. Batchelder.

that conversation. He had heard his father say, that we should all be happy in another world, and that we should be punished for our evil deeds in this state. Now, if in consequence of such a general statement from a witness whose education, it was apparent, had been much neglected, the witness, E. C. Beals, had been rejected, it would then have followed that a great body of our fellow-citizens would, by the judgment of this court, have been disfranchised and excluded from their oath, both in civil and criminal cases. With my present views of the law, if a man believes in the being of God, and in his attributes as a righteous avenger of wickedness, and in the existence of a future state, I consider it my duty to admit him to his oath. From such a belief it follows that God will punish him who commits wilful perjury, that crime so odious to God and man, either in this world or in that which is to come. The punishment will be worthy of a God of perfect justice, whether inflicted in this or in a future world. Who, then, will not dread such a punishment, and who will not fear to commit such an offence? But it is your right and your duty to weigh the credibility of all the witnesses who have been sworn and examined at the present trial. If from anything which has appeared from the statements of the witnesses themselves, or from what they have testified respecting each other, you believe that any of them have not testified the whole truth, or that they did not reverence the sanctions of an oath, whether on account of their peculiar religious tenets, or from their general disbelief of all religious obligation, or from any other cause, you will be justified and it will be your duty to withhold confidence from their testimony.

The government having proved the publication of the libel by the defendant, and shown the grounds on which it relied to prove that it was malicious on his part, it was his right, and it became his duty, to show the grounds of his defence, which are well worthy of your deliberate consideration. 1. And in the first place, he denies all actual or implied malice, or any inten-

tion on his part to defame the deceased. He says, that so far from intending to defame the deceased, it is apparent, from the whole piece taken together, that it was designed to show, that he died in a state of penitence, with a hope of future happiness, and in the exercise of a gracious change of heart, and not in a state of general stupidity and indifference upon all religious subjects. 2. That the piece complained of was not aimed against the reputation of the deceased, but designed to expose a certain indiscreet publication in the Trumpet. 3. And lastly, that although it was true, in fact, that the deceased was in his lifetime addicted to profanity, yet that it appears from the piece itself, that he lived to repent of it, and that he died in a state of grace. It is your duty, in order to form a correct judgment, to read the obituary notice which appeared in the Trumpet of the 10th of January last. What seems to have excited attention, and to have called for observation on this publication was, that it represents the young man as having been perfectly moral in his habits and character, without having been under the influence "of any particular tenet of religion;" and as being perfectly confident of future happiness and prepared for it, because he recollected no action of his life "which caused him the least anxiety;" and because "God was above the devil." And therefore he is represented as "a pattern for the imitation of the rising generation." Now it is for you to consider whether the design of the writer of this obituary notice was, that it should influence the religious faith and practice of others, and so promote any particular views of religious faith. If so, then it was the right of any person who believed that the publication was erroneous, and calculated to make an injurious impression upon the community, to counteract the mischief, by showing, in decent language, its evil tendency; and if that was the object of the reply, it would not be an offence. To the defendant the deceased was an entire stranger. But he is the editor of a religious newspaper, which is called "The Anti-Universalist," the design of which is to oppose universalism,

and consequently to oppose the Trumpet, which is devoted to the interest of that class of believers which professes that doctrine.

Let me observe to you that religious freedom is one of the distinguishing characteristics of our country. No one sect of Christians is, in law, entitled to preëminence over another ; and all denominations of Christians, while they demean themselves peaceably, may equally claim the protection of the law. Every religious sect is free to profess and to propagate its sentiments, to inculcate them by words and in writing, and consequently to display the errors of others. And while the various combatants confine themselves to using the arms of reason alone, preserving good humor and Christian charity and forbearance towards each other, the peace of the state will not suffer, and the government and laws will protect them all. I indulge the hope and belief that more good than evil results from the diversity of religious opinions which prevail at the present day and from the controversies which exist between the different sects. Individuals are excited to search the scriptures for themselves, and rival sects are more emulous to cultivate and display the virtues of the Christian character. We are alive and not dead to a subject, in which not only our present but future happiness is concerned. To complain of controversy, because it sometimes excites evil passions, is as reasonable as to complain of the wind, which sometimes rises into a tempest, and is destructive to life and property. Whatever evils result from this freedom, it is a state far happier than was the condition of the Christian world before the reformation, when all were required to believe and professed to believe the faith of the catholic church ; at which period, if we may trust to history, more vice and irreligion prevailed, both among clergy and laity, than in any subsequent age of the church.

The defendant was called upon by Edward L. Beals, who informed him, that the obituary notice had not done justice to the character and faith of his deceased brother ; that while he

enjoyed his health he professed universalism ; but that he was not exemplary in his conduct, as he allowed himself habitually in profanity ; that in the course of a long sickness he changed his views of religious truth, confessed himself to have been a sinner, became, as the witness thought, penitent, expressed contrition, and died in the exercise of such feelings and sentiments. The witness finally requested the defendant to contradict the statement in the Trumpet. Thus authorized, the defendant wrote and published the piece from which are extracted the words which in the indictment are alleged to be libellous. You must take the whole piece and form your opinion of the intent of the writer from the whole, and not from a detached passage. I think that he had, under the circumstances of this case, a right to comment on the piece in the Trumpet, and to display, in temperate language, its errors both in fact and sentiment, even if in so doing he was obliged, from regard to truth, to attribute to the deceased faults of character. It seems, from the evidence, that the deceased occasionally made use of profane expressions, even in his last sickness. Whether it amounted to a habit, or was the effect of accident or infirmity, you must judge. Indiscriminate eulogy on the dead is not calculated to stimulate the living to virtue. If virtue requires effort the motives to virtuous exertion should not be diminished. It was, therefore, in my opinion, within the rules of legitimate controversy, and according to the freedom of religious sentiment and of the press which we enjoy, for the defendant to correct the errors in this notice of the deceased, and to seize the opportunity to inculcate a religious or moral truth. But it is your province to consider and decide, whether the piece was written with this honest intent, or for the purpose of bringing his newspaper into notice, and with a malicious design to defame the memory of the dead, or wound the feelings of the living. If you are not satisfied of this malicious intent, it will be your duty to pronounce a verdict of acquittal. But, on the contrary, if you believe from the evidence, that the defendant

Commonwealth v. Curtis and another.

was actuated with a foul intent to inflict an undeserved stain upon the deceased, you are bound to find him guilty, and to leave him to suffer the penalty which his offence has merited.

The jury returned a verdict of acquittal.

NOVEMBER TERM, 1829.

COMMONWEALTH v. HENRIETTA CURTIS AND ELIZABETH COREY,
alias ELIZABETH SUMNER.

A plea of previous conviction cannot be sustained, unless it appear that under the first indictment or complaint, the real merits could have been tried, and the defendant was actually in jeopardy.

A court has no cognizance of an offence for which it cannot inflict the extent of the punishment prescribed by the statute.

THIS indictment was found at the October term. It charged that the defendants, on the 26th of September, 1829, stole four silver salt-spoons, of the value of two dollars, and five silver teaspoons of the value of eight dollars, in the dwelling-house of William Fenno, in the city of Boston. The defendants pleaded in bar to this indictment a conviction for the same offence at the police court of this city, before Benjamin Whitman, one of the justices, on the 5th of October, 1829, before the indictment was found. The plea was in substance, that William Fenno, on the 5th of October, 1829, complained against them in the police court, that they were severally wanton and lascivious persons in speech, conduct and behavior; and also that the defendants "were and are severally pilferers, and on divers days and times, at said Boston, within six months last past, did pilfer, steal, and carry away divers articles, the property of said Fenno;" that they were duly arrested, and tried before justice Whitman, found guilty, and severally sentenced to pay a fine of twenty dollars, and a moiety of the

Commonwealth v. Curtis and another.

costs ; with a proffer of the record ; and they then averred that they were the same persons who were named in the said complaint ; " that the goods and chattels in this indictment specified, were the same identical articles, goods and chattels set forth, specified and alleged in said complaint of said Fenno, to have been pilfered, stolen, and carried away from said Fenno ;" " That the said stealing, taking and carrying away of said articles, goods and chattels, in the dwelling-house of said Fenno, in the indictment, was the same identical stealing, taking and carrying away, specified in said Fenno's complaint ;" — and that the police court had jurisdiction, &c.

To this plea, the attorney for the commonwealth, after oyer prayed for of the record, which was granted and set forth, replied, that the articles mentioned in the record were of the value of ten dollars ; and that the defendants did steal the same in the dwelling-house of the said Fenno ; that no lawful judgment was ever had in the police court against said defendants ; that the police court had no jurisdiction of the felony, and that the said supposed record and proceedings were null and void and of no legal effect ; and that they exercised a cognizance of an offence, which exclusively belonged to the supreme judicial court and to this court, and concluded with a verification. To this replication the defendants demurred and assigned the following causes of demurrer : First, that it was multifarious and double in five particulars, viz. : in alleging that the defendants did feloniously steal the said spoons in the dwelling-house of said Fenno ; that no lawful judgment was ever had in the police court against the defendants, for the felony which is charged in the indictment ; that the police court had no jurisdiction of the said felony ; that the said supposed record and proceedings were null and of no effect ; and that the police court exercised jurisdiction in a case, the exclusive jurisdiction of which was vested in the supreme judicial court and in this municipal court, saving to cause them to be arrested and held to bail ; — all which they said were traversable facts. Second,

Commonwealth v. Curtis and another.

because the said replication concluded with a verification, instead of tendering an issue to the country. Third, because it was argumentative in various particulars, viz.: in alleging that the stealing of said articles was in the dwelling-house, and therefore no lawful judgment was ever had in the police court for the same; that the police court had no jurisdiction of the felony set forth in the indictment, and therefore the record and proceedings of said police court in the premises were null and void; that the said record and proceedings of said police court were a supposed record and proceedings, and not real and true; and that the said police court exercised cognizance and jurisdiction of an offence, the lawful cognizance of which was exclusively in the supreme judicial court and in the municipal court. Fourth, because the replication neither admitted nor denied the several matters set forth in the plea, nor traversed the same, nor confessed or avoided the same, nor in any way answered the same, nor tendered an issue, nor demurred to the same. Fifth, because the replication improperly joined matters of law and matters of fact not capable of a trial, to which no single rejoinder could be pleaded. Lastly, because it was in other respects double, uncertain and defective in law. To this demurrer, there was, on the part of the commonwealth, a joinder.

S. D. Parker, for the defendants, cited 1 Chitty P. 230; ib. 625; ib. 549; 13 Mass. 457; ib. 247; Sayer R. 208-299; Hob. 244; 1 Chitty P. 572; 2 Saund. 285, n. 5; ib. 290; 2 Mod. 60; Archbold's C. P. 53, 54; 1 Chitty, 216, 518; Cowp. 684; 5 East R. 275; Com. Dig. tit. Plea, L. (6), 78; ib. E. 3; 6 East, 597; Hob. 295; Bac. Abr. Plea, I. 5 and 6; 2 And. 179, 80; Allen, 48; 2 Saund. 319, n. 6; 1 Chitty P. 519, 520; 7 John. R. 75, 78; 9 Co. 24, 25; 6 East, 561, 562; Archbold P. C. 51; 9 East, 437, Emden; 1 Brod. & Bing. 473; East P. C. 522; 2 Leach, 522; Starkie C. P. 304; 3 Wilson, 308; Wm. Black. 827; 2 H. P. C. 236; Fost. 325; Starkie C. P. 314; 4 Chitty C. L. 534, n.; 2 Leon. 160; 3 Inst. 131; 4 Co. 45; 17 John. 145; 8 John. 69; 2 Salk.

674; 3 T. R. 38; 2 East, 246; 1 Burr. 245; 2 Str. 1149—1213.

Austin, for the commonwealth.

THACHER, J. Upon inspection of these pleadings, it is apparent that the several facts and allegations in the replication are contained in the indictment, and in the record of the police court; and therefore had the attorney for the commonwealth demurred generally to the plea, after oyer of the record had, the court would have been bound to decide on the validity of the proceedings in the police court, which the defendants in their plea say are the premises specified in the indictment, and on which they rely as a bar to the same. But by the demurrer in this case, the judgment of the court must be on the whole record;¹ and therefore, although for the causes stated in the demurrer, or for any other cause, the court should deem the replication bad, still, if the plea should be found to be insufficient, the defendants must be held to answer, unless there should be a fatal defect in the indictment, in which case the defendants would be entitled to their discharge. It will be most convenient, therefore, to reverse the order, which was adopted by the defendant's counsel in his argument, and to inspect first the indictment.

The indictment is upon the fifth section of the act of 1804, c. 143, (Rev. St. c. 126,) and charges that the defendants, on the 26th day of September, 1829, took, stole and carried away four silver salt-spoons of the value of two dollars, and five silver teaspoons of the value of eight dollars, of the property of William Fenno, in his dwelling-house, in Boston. It is in usual form, and I see no defect in it as to the form or substance. To this indictment the defendants have pleaded a former conviction before the police court of this city, as a bar to any further prosecution for this offence. The principles of law, which are

¹ Chitty on Pleading, 647.

Commonwealth v. Curtis and another.

in general equally applicable to a plea of a former conviction and to that of a former acquittal, are perfectly settled, and will guide us in forming a correct judgment in this case.¹ A person convicted or acquitted in a court of competent jurisdiction, may plead such judgment in bar to a second indictment for the same offence, but he cannot plead an acquittal or a conviction of an inferior offence, in bar of an indictment for a higher offence, although each was part of the same act, unless a conviction of the crime of manslaughter, which is a bar to a second indictment for the murder, be an exception to the rule.² To make such a plea in bar effectual, the conviction or acquittal must be lawful; by which is meant, on a sufficient indictment or complaint, and before a court which has right to take cognizance of the offence; for where an offender has been discharged upon an insufficient indictment, or by an incompetent tribunal, there the law has not had its end.³ It must be for the same offence. "I do not see," says Sir Michael Foster, "how an acquittal upon one indictment could be a bar to a second for an offence specifically different from it." If, however, the nature of the crime be in substance the same, a variance may be helped by proper averments.⁴ What is meant by the same identical cause of action is correctly laid down by Ch. J. De Grey, in expressing the opinion of the court of common pleas, in *Kitchin v. Campbell*, (3 Wilson, 304,) to be "where the same evidence will support both the actions." And it is there truly said, "this is the test to know whether a final determination in a former action is a bar or not to a subsequent action; and it runs through all the cases in the books, both in real and personal action." I think I may add also that this test is equally

¹ Hawk. B. 2, c. 35, s. 5; Rawle on the Constitution of the U. S. 196; 1 Chitty, P. C. 462, 463; 4 Ib. 534, n; 2 Leon. 160; 4 Co Rep. 46, b; 2 P. C. 245.

² *Borough v. Holcroft*, (2 Leon. 160.)

³ Chitty, C. L. 462; *Emden's Case*, (9 East R. 441.)

⁴ Foster, 362; Hawk. B. 2, c. 35, s. 3.

applicable to criminal cases.¹ A former acquittal is no bar to a subsequent prosecution, unless the defendant might have been convicted on the first indictment, by proof of the facts contained in the second. And it appears to me to be an equally correct inference from the authorities, that the plea of *autrefois convict* cannot be sustained, unless proof of the facts in the first indictment or complaint will sustain the facts in the second. But whether the party relies, in his plea, on a former acquittal or on a former conviction, I consider it to be a true criterion of the goodness, if it appear that under the first indictment or complaint, the real merits could have been tried, and he was actually in jeopardy.²

In applying these principles to the case at bar, we perceive by the defendants' plea, that they were charged and convicted before the police court upon the statute, as lewd and lascivious persons in speech, conduct and behavior, and also as pilferers.³ It is upon the conviction of the last offence that the defendants rely as a bar to the present indictment. It would be sufficient, I think, to say, that by comparing this indictment with the record and proceedings of the police court, the offences charged in both are of an entirely different character and degree; and that it is not possible, by any indulgence of special pleading, to show, by any averments, that they are one and the same offence; nor have the defendants averred, in their plea, that the offences are the same. Under the complaint in the police court, the merits of the offence, which is charged in this indictment, could not have been tried, and they were not in jeopardy for the same. They could not have been convicted and punished for the offence of stealing in the dwelling-house of William Fenno, because, as we shall see, the police court could not award the punishment which the law prescribes for

¹ *Rez v. Clark*, 1 Brod. & Bing. 473.

² *Vandercom & Abbot's Case*, (1 East, P. C. 522, c. 15, s. 29); *Emden's Case*, (9 East R. 437.)

³ Act of 1787, c. 54, and 1823, c. 25, and 1822, c. 82.

Commonwealth v. Curtis and another.

that offence. But further, to convict a person of being a pilferer, it must be proved, "that on divers days and times," as the offence is described in the complaint, "he did pilfer, steal and carry away divers articles." His offence consists in his character, as being of that class of vagabonds who are denominated pilferers, and to convict them of which it must be proved, that in three instances at least, they had been guilty of petty larceny; as it is necessary to prove three instances at least of selling, to authorize the conviction of a person as a common retailer of ardent spirits without license. But one larceny only is charged in this indictment; and proof of that would not have authorized Justice Whitman, in the police court, to convict the defendants as pilferers. The instances of larceny must likewise be of such as fall within the jurisdiction of a justice of the peace; for if he may exceed this limit, where is he to stop? Now, I apprehend, that this is not left to the discretion of the magistrate, but is distinctly marked by positive regulation. One rule to guide our judgment on this subject is this: if the court has not the right to inflict the whole punishment for the offence which the statute prescribes, the cognizance belongs to another tribunal; because where the punishment is left to the discretion of the court, it is the duty of the justice to exercise that discretion in every case, and to inflict the whole punishment whenever, in his judgment, the offence requires it.

What is the jurisdiction of the police court in criminal cases? By the act of 1821, c. 109, creating the police court, "the justices of that court are authorized 'to take cognizance of all crimes, offences and misdemeanors, whereof justices of the peace may take cognizance by law,' and of all offences which may be cognizable by one or more of said justices, according to the by-laws, rules and regulations of the city of Boston." By the act of 1783, c. 51, "Justices of the peace shall examine into all homicides, murders, treasons and felonies done and committed in their counties, and commit to prison all persons guilty or suspected to be guilty of manslaughter, murder, trea-

son or other capital offence. And to hold to bail all persons guilty or suspected to be guilty of lesser offences, which are not cognizable by a justice of the peace, and shall take cognizance of or examine into all other crimes, matters and offences, which by particular laws are put within their jurisdiction." By the second section of the act of 1804, c. 143, "Every justice of the peace, within his proper county, shall have concurrent jurisdiction with the supreme judicial court, the courts of common pleas, and the municipal court of the city of Boston, of all larcenies, where the money, goods or other article or articles stolen shall not be alleged to exceed in amount or value the sum of five dollars." "And any person duly convicted before a justice of the peace of any larceny, either as principal or as accessory before or after the fact, shall be punished by such fine, not exceeding five dollars, and imprisonment in the common jail for such term, not exceeding twenty days, either or both, as the said justice, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence." I am not aware that the jurisdiction of a justice of the peace in cases of larceny exceeds these limits.

By the fifth section of the same act of 1804, c. 143, it is enacted, that if any person shall commit any larceny in any dwelling-house, upon conviction of such felony in the supreme judicial court, he shall be punished by solitary imprisonment for a term not exceeding six months, and by confinement afterwards to hard labor for a term not exceeding five years to be ordered as aforesaid." The act virtually excludes the jurisdiction of a justice of the peace over a felony of this description, by vesting it expressly in the supreme judicial court. It is said, however, with truth, that the police court had jurisdiction of the offence described in the record, and for which the defendants were convicted before justice Whitman, and that therefore the judgment in that case continues in full force. But if the plea is to be sustained for that cause, it would follow that a party might at any time be charged before the police

Commonwealth v. Cur'is and another.

court with an offence of which he was confessedly innocent, in order to try him for one which exceeded its jurisdiction. The statute is not to be evaded in this way. If the justice had not the jurisdiction directly, he cannot acquire it indirectly. And I may add that the honor of every court and the safety of the citizens consist essentially in a strict adherence to the limits of its authority, as prescribed by law.

There is another and a still more weighty consideration which applies to this case. Before a party can be convicted in any court of the offence of stealing in a dwelling-house, which supposes a great degree of hardihood, and affects him with a deep stain of guilt, the law has provided, in its wisdom, that the offence shall be first investigated by the grand jury, and that the party shall have a right to a trial before a jury of his peers. If such an offence has been committed, it is due to the public justice that the offender shall suffer the penalty of his transgression. But he is not to be tried and convicted in a summary manner, before a justice of the peace; and no man who is charged with an atrocious crime is in a situation to go to trial and to defend his innocence at the moment of his arrest. The result of my deliberation is, that it does not appear from the record of the proceedings that the defendants have been tried and convicted before Justice Whitman, in the police court, for the offence which is charged in this indictment; and if it is true in fact that they were so tried, then the conviction was not lawful; because the police court had not final jurisdiction of the offence, but only an authority to hold the parties charged, to bail to answer at the legal tribunal.¹ It follows that the plea is no sufficient bar to the further prosecution of the indictment.

The plea being thus adjudged to be bad, there is no necessity to enter into the investigation of the merits of the replication, although I am very sensible of the great diligence and research which the learned counsel have bestowed in their argu-

¹ *Jackson v. Wilson*, (17 John. R. 145); 3 T. R. 38.

Commonwealth v. Wright and another.

ment on that part of the case. The demurrer is therefore overruled, and the defendants must be ordered to plead again to the indictment.¹

DECEMBER TERM, 1829.

COMMONWEALTH v. WILLIAM WRIGHT AND ABRAHAM A. DAME.

Where a wharf is extended below low water mark, and into the channel of the tide waters of the commonwealth, it does not necessarily follow that it is a common nuisance and must be abated, but this is the presumption, and the defendant must show that it is no impediment to navigation, or detriment to the public.

If the effect of such wharf is to fill up the channel, or injuriously divert the current, it is a nuisance.

THIS indictment was found by the grand jury, at the November term, A. D. 1828, and was continued by consent to this term. It was for a common nuisance, and contained two counts. The charge in the first was, that the defendants, "on the 1st of November, 1828, did unlawfully erect, in the harbor of Boston, being a common and public highway, and in the channel part and common current of the navigable water of the said harbor, and beyond the line of low water mark, a certain wharf of wooden piers, of the length of one hundred feet, and of the breadth of twenty feet, being of such large dimensions that the citizens of the commonwealth cannot pass and navigate with their vessels through the harbor, as they were before accustomed to do." In the second count, after setting forth that the harbor of Boston is an ancient, and common and public highway, for all the citizens to navigate with their vessels, &c., it charges that the defendants, "on the 1st of November, 1828,

¹ *Com. v. Goddard*, (13 Mass. R. 457); *Com. v. Cunningham*, (ib. 259).

in and upon the bed and soil of the said harbor, where it is usually covered with water, and in the stream channel and navigable part of said harbor, near the southern extremity of the same, did unlawfully place twenty piers of timber in the manner of a wharf, by reason whereof the navigation of the said harbor is greatly obstructed and narrowed ;" both counts concluding, to the common nuisance of all the good citizens of the commonwealth, and against the peace, &c. The defendants severally pleaded, that they were not guilty.

Stephen P. Fuller, a witness for the commonwealth, testified to the correctness of the plan exhibited, which had been taken by him under an order of this court, of the part of the harbor and channel where the wharf is situated, showing the position of the wharf, the depth of the water, the free bridge, and other local objects in the vicinity. He also testified that the wharf was built one hundred and forty-two feet into the channel, beyond the line of the low water mark, and that it was done by the defendants, and at their expense. The counsel for the defendants insisted that the government were bound to proceed further, and to prove that the wharf was a common nuisance, in support of which he read various passages from Angell on Tide Waters. But the court decided that the building of a wharf or other structure, into the channel, which was a public highway, was to be considered *prima facie* as a nuisance, and that the burden was upon the defendants to show that it was not so to be considered.

Austin and Lemuel Shaw, for the commonwealth.

Samuel Hubbard and S. D. Parker, for the defendants.

THACHER, J. This is a charge against the defendants for a common nuisance in building a wharf, of one hundred feet in length and twenty feet in breadth, into the channel of the south harbor of the port of Boston. And it will be convenient for me to state to you, in the first place, the general principles of law which apply to the case. Our ancestors brought to this country

the common law of England, which they claimed as their right and inheritance, and it has continued to be a part of our law to the present time, so far as it was applicable to our situation, and where it has not been altered or repealed by the constitution of the commonwealth, or by acts of the legislature. By that law the sovereign is the owner of the shore, as it is called, which is the "ground that is between the ordinary high water mark and low water mark," as well in "the shore of the sea as in the shore of the arms of the sea, where the sea flows and reflows, and so far only as the sea flows and reflows." (Hale's *Treatise De Jure Maris*. C. 2, p. 12, in Hargrave's Tracts.) When it is said that the sovereign is the owner of the seashore, it is meant that the legal title is in him, not for his exclusive use and profit, but in trust for the common benefit of all his subjects. It is therefore his duty, as well as his right, to keep the seashore free from encroachment, and not to suffer any individual, on his mere authority, to intrude on it. But sometimes the common good of all the subjects requires that bridges should be erected across the channel of a sea or river, and that wharves and other commercial accommodations should be projected beyond the line of high water mark, and even into the channel, and therefore the law leaves it to the wisdom of the sovereign, and makes it his right and duty to have these constructed. What in England belongs to the king, in our more free and equal system belongs to the people, whose will is expressed and whose rights are represented by the legislature. One of the earliest acts of the colonial government was to grant to the proprietors of the soil "adjoining to creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the right of propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further." This was about the year 1681. If a citizen, of his own authority and without the consent of the legislature, and after so liberal a grant, shall infringe upon the right of all the other citizens, by extending his wharf beyond

Commonwealth v. Wright and another.

the line of low water, and into the channel, to the common detriment, it is his own presumption; and if the commonwealth, in the exercise of its trust, shall eject the intruder, and cause the nuisance to be abated, he must recollect that he has offended against a principle of law, which is as ancient as it is reasonable, and as well known as any other principle in our code.

But it does not necessarily follow, because the defendants have extended their wharf beyond the line of low water, and into the channel, that it is a common nuisance, and that it must be abated. Where it is shown that a person has intruded upon a highway which is common to all the citizens, and has appropriated it to himself exclusively, the presumption is, that it is a detriment to the public, because it is a diminution of their privilege in the enjoyment of a common right. But the presumption in such case may be repelled on the part of the citizen, by showing that so far from having created a detriment to the public, by extending his wharf into the channel, or by the structure which he has placed on the highway, he has thereby in truth increased their accommodation, and not diminished it, and therefore that he is not liable to be convicted of a nuisance, nor ought the wharf or other structure to be removed. It is true, he may say, that this has been placed on the highway, and I know any citizen may use it. I can neither prevent him from the use, nor compel him to pay me for the enjoyment. The government may also, by its officer, enter upon it and eject me from the possession. But what I have done is not a public evil but a public good. The law is so; but then, as it is most reasonable, so I conceive it to be incumbent upon him to show this fact in his defence. And this was the course pursued in the trial of the case of the indictment against John May, in the supreme judicial court for this county, in March, 1803, for a nuisance in extending Union wharf, at the north part of this city, into the channel. It was a case of great interest, and the trial occupied several days. The most eminent

counsel were engaged on both sides, and the trial was before five of the seven judges who at that time composed the court. In the trial of this case, in which there was a full discussion of the law, the greatest question was, whether it was competent for the defendant to show, in his defence, that the extension complained of was a public benefit. It was not intimated that the government was bound to go further, in the first instance, than to prove that the wharf was built below the line of low water mark, and that it extended into the channel.

"If any one," says Abbot, Ch. J., in the trial of the case of the *King v. Grosvenor*, (2 Starkie R. 510), indicted for a nuisance, in erecting a wharf on the river Thames, to the injury of the navigation of that river, "undertakes to make a change in a public highway, without resorting, in the first instance, to the proper tribunal, which has the power to decide whether the change will operate to the prejudice of the public, he incurs the burden of proving, that what he does is not a nuisance to the public. Much evidence has been adduced on the part of the defendants, for the purpose of showing that the alteration affords greater facility and convenience for loading and unloading; but the question is, not whether any private advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or that portion of it which is interested in the navigation of the river Thames, has been affected or diminished by this alteration. The public have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered."

It is the right and duty of the government, to preserve the highways from obstruction both by land and water, since both are of the highest moment, the one for the navigation of boats and vessels, the other for land carriages. The port or harbor is free for all, whether citizens or strangers, to navigate, and ought to be preserved from impediments and nuisances, which would hinder and annoy the access, stay, or departure of ves-

Commonwealth v. Wright and another.

sels. It is not necessary to dilate on the importance of the harbor to a place whose inhabitants are dependent on commerce for their subsistence. Destroy the harbor and you will soon make the city desolate. Indeed, so careful is the law of the freedom and security of the highway, both on land and water, that any person may, upon his own authority, lawfully remove by force a common nuisance. "Any man," says Lord Hale, "may justify the removal of a common nuisance, either on land or water, because every man is concerned in it."¹ The public may not be subjected to the inconvenience and delay of a long litigation; for the law in this matter departs from its usual severity, which forbids resorting to violence in most cases of civil wrong. For, suppose a man should place his cart in the middle of State street, or should, upon his own claim of right, throw a bridge across the channel from Union wharf to Chelsea beach, and so destroy the highway for the purpose of the passage of vessels to Charlestown, and to the western and northern parts of this city; it would not, I think, be tolerated for a day. But those who, by force remove a nuisance, act upon their own responsibility, and no one should resort to this forcible mode of redressing a nuisance, but where the right is clear and the necessity is urgent. "Because," says Lord Hale, "this many times occasions tumults and disorders; the best way to reform public nuisances is by the ordinary courts of justice."² The object of the present indictment is to preserve the safety of our harbor, and to protect the public in the full enjoyment of what they are by law and of common right entitled to, a free and unobstructed navigation; and if you should finally decide, that the defendants are guilty, you must further say, what part of the wharf is to be considered as a nuisance, that the court may know what judgment to render on the verdict.

1. It seems not to have been contested by the counsel for the defendants, that the wharf is erected on the channel of the

¹ Hale's Treatise De Jure Maris, 67.

² Ibid.

Commonwealth v. Wright and another.

harbor, which is, and ever has been, from the settlement of the country, common to ships, vessels, and boats of all sizes, to enter, remain and leave at pleasure, whether belonging to citizens or strangers. It is this right of common use which constitutes it a highway. "As the common highways on the land are for the common land passage, so rivers, whether fresh or salt, that are for common passage, and ports and harbors are highways by water." If a person intrudes on the property of the public, it is a *purpresture*, and the people may enter upon the same by the proper officer of the government, and repossess themselves of it. This is in the nature of a civil remedy. But an intrusion into, or an occupying of the public highway, which straitens or incommodes the public in the enjoyment of a common right, as that of passing, is a common nuisance. It may sometimes be very convenient, that a tent should be placed in the street, for passengers to rest in, or to refresh themselves; but it is a nuisance, for if every one should pitch a tent there likewise, it would destroy the street. So if every citizen should build into the channel, it would destroy the channel, and, therefore, although one wharf extended into the channel might be a convenience, yet if every citizen should extend his wharf into the channel, it would destroy it, and therefore it would be a common nuisance. The legislature cannot authorize a common nuisance. But as it is for the good of the public that the bay should be furnished with convenient wharves running into the channel for the accommodation of large vessels, of the convenience and necessity of which the legislature must judge, so it belongs to them to supply this necessity or convenience, or to authorize individuals to do it at their own charge, and to remunerate themselves by a charge for wharfage, dockage, &c.

2. The defendants have not denied, by their counsel, that they caused this wharf to be erected; not under the authority of an act of the legislature, nor even with the consent and approbation of the city, but on their own claim of right. They are in possession of the upland under a claim of propriety.

Commonwealth v. Wright and another.

Whether their title to these flats is absolute and under a legal title, need not give to you any trouble to settle. The title is not in issue. No one claims it against them ; no better title is shown ; and they are at any rate answerable for the nuisance, if you shall find it to be one. I have not been able to see that the goodness of their title to the flats and upland is a material point to be settled in this cause.

3. On the part of the commonwealth, it was first proved by the testimony of S. P. Fuller, the surveyor, that the defendants have extended this wharf to the distance of one hundred and forty-two feet below the line of low water into the channel, which is, at this place, three hundred and fifty feet wide. Here the counsel for the government rested their case in the first instance. If nothing more had been shown on either side, it would have been for you to say whether such an encroachment on the public highway without necessity, or justification, or proof of benefit to the public, was not a common nuisance. I should have felt bound to instruct you, that it was an encroachment on the public convenience, and that in the absence of all proof on the part of the defendants, tending to show that the wharf was a benefit to the channel, you would be bound to find them guilty. The case would have been different if the commonwealth had complained of a wharf, erected within or above the line of low water. This would have been within the legal right of the defendants, and the presumption would therefore have been, that it was no more than they might lawfully do ; and until it had been shown by evidence that it was, in fact, a nuisance, the defendants could not have been required to justify or excuse the act. The defendants have gone into the examination of many witnesses, and from their testimony they argue that this wharf is a common benefit to the citizens for various reasons, namely. 1st. Because they say, it furnishes a safe and efficient guide to those who navigate that channel, being built on a line with the current, and so facilitating the passing of vessels. 2d. It furnishes a facility for those vessels which in-

tend to pass through the draw of the free bridge, because by running a warp from the vessel to the wharf, it can get along with more safety and ease than in any other way. 3d. It will save time, in moderate weather, to make vessels fast to this wharf instead of dropping an anchor, which they would otherwise be obliged to do. 4th. In returning through the draw from the more southerly wharves, vessels are furnished with a great convenience by running a line to this wharf, so as not to come to anchor or stand in the way of other vessels following them through the draw. 5th. It is a convenience for vessels to lie at this wharf waiting for a wind, rather than attach themselves to the buoy, where they are apt to run foul of each other. 6th. This wharf protects vessels lying at it in a north-east storm, and furnishes a necessary protection to the bridge. The counsel for the defendants insisted that the wharf did not narrow the channel so much as was pretended, or divert the current into a new direction, and they argued, that if the wharf was away, a succession of buoys would be required to direct the passing of vessels; and that the space was not wanted for vessels, as the water was not of sufficient depth to permit them to pass over it, or to come to anchor. But the counsel for the commonwealth, after displaying the importance of the harbor and navigation to the prosperity of the city, how much it depended on the coasting trade, and how necessary it was to keep this channel free for the passing of vessels to and from the wharves at the south of the city, insisted that this wharf is an encroachment on the public highway, and that by law the defendants were bound to show that it did not injure any one, and that it was a decided benefit to the navigation. It is undoubtedly true, as the learned counsel has urged, that to straiten a public highway is always an inconvenience, and that you are bound not to allow it on possible ground of speculative advantage. It is for you, however, to determine, whether the whole space which nature has assigned to the channel in this quarter, is not wanted for vessels to come to and lie at anchor.

Commonwealth v. Wright and another.

It is contended, by the counsel for the commonwealth, that it has been made clear by the testimony of the witnesses, that the depth of water is lessening in our harbor, and that every new wharf has a tendency to increase that effect. And further, that the erecting of this wharf has caused a prejudice to the channel, by giving a new and more southern direction to the current.

They have argued, that although it may be convenient in some cases for vessels passing this wharf, to make use of it for towing and warping by it, so as to approach the draw of the bridge in that way; yet, that no such right as that of towing exists, and that the defendants may exclude individuals from making that use of it. I am of opinion, as to this point, that if an individual erects a wharf upon the highway, he cannot exclude any of the citizens from going upon it, and using it, as if it were in its natural state. The improvements made upon it by individuals do not change it from public to private property. But I do not consider that the citizens may freely, and without the consent of the proprietor, enter upon a wharf, which is erected within the line of low water, for the purpose of towing their vessels, or for any other. In this case, the proprietor would have right to insist on compensation for the use made of his estate: but one who has intruded upon the public highway, may not only not claim any compensation for such use made of his improvement, but any citizen may rightfully abate the encroachment, and the officer of the government may enter upon it, and reinstate the public in its rights.¹

That you may settle the facts in this case with intelligence, you must examine impartially the testimony of the witnesses on both sides. They are numerous, thirty-five having been examined for the defendants, and thirteen for the commonwealth. It is your peculiar province to decide whether they were honest, intelligent and independent witnesses; to compare the degree of knowledge which they severally possess, and to ascertain

¹ *Ball v. Herbert*, (3 Durnford & East, 253.)

Commonwealth v. Wright and another.

whether it was the fruit of experience and observation, or derived from the information of others. The witnesses, on both sides, consisted of masters of coasting vessels and lightermen who had navigated this channel, and of experienced navigators and pilots, and of other citizens, who did business in the vicinity of the wharf, or whose course of duty had called them frequently to that quarter. Most of them were acquainted with the harbor, and qualified to form a judicious opinion of the effect of this wharf upon the southern channel. (Here the judge read the testimony of each of the witnesses from his minutes.) Now it may undoubtedly be true, that this wharf may occasionally have been useful to vessels passing through the channel in that quarter, and yet, if all the purposes for navigating vessels there can be effected by a buoy, which is movable and causes no obstruction, then the necessity for this permanent wharf thrown into the channel is removed, and it will cease to be a benefit. If the effect of building a wharf into a channel will be, in the course of time, to injure and destroy the channel here, by lessening the depth of the water, or by giving a new and injurious course to the current; and if such injurious effects will in your opinion exceed the benefit to navigation, you must, in that case, declare it to be a common nuisance. If the defendants have left it doubtful in your minds whether this structure is a decided benefit to the navigation, they have failed in their defence. Finally, you are witnesses sworn to decide what you believe to be true from all the testimony; and you are to apply to the case a sound and impartial judgment, not failing to exercise that common sense which is the effect of your own experience in such matters, and without which the deepest research into books will fail of the truth.

The jury found the defendants guilty, and declared so much of said wharf a nuisance as was contained in a triangular piece marked upon the plan, and not guilty as to the residue.

JANUARY TERM, 1830.

COMMONWEALTH v. MARTIN LUTHER TWOMBLY.

Under the acts of 1783 and 1794, the police court of the city of Boston has jurisdiction of the offence of a riot, connected with an assault not of an aggravated character.

THACHER, J. In this indictment it is charged against the defendant, that he, on the second day of November, 1829, at Boston, with force and arms, together with divers other persons more than ten, whose names are to the jurors unknown, riotously, routously and tumultuously assembled and gathered together, armed with large sticks and clubs to disturb the peace of said commonwealth, and being so assembled and gathered together, passed through divers streets and highways in said city to the terror and alarm of all the good citizens there being, inhabiting and passing, and then and there the glass in a window of the dwelling-house of one James Sherman there situate, and the wooden frame of said window riotously, routously and tumultuously did break and destroy, and in and upon one Caroline Sherman, in the peace of said commonwealth, within said dwelling-house being, did in the same riotous, routous and unlawful manner make an assault, and with the broken glass of said window the face of said Caroline did cut and wound, and other wrongs and injuries then and there riotously, routously and tumultuously did, against the peace of said commonwealth. To this indictment the defendant, after protesting that he is not guilty, pleads that the commonwealth ought not further to prosecute him in the premises, because that at the police court of the city of Boston, on the 3d day of November, 1829, he was brought, by virtue of a warrant issued on that day, to answer to the commonwealth of Massachusetts, on the complaint of James Sherman, of said Boston, trader, that he, said Twom-

bly, and one Marshal Page, of said Boston, laborer, with divers other persons, whose names were unknown to the complainant, on the 2d day of November, 1929, with force and arms were dangerous and disorderly persons, and then and there contriving and intending to disturb the peace of said commonwealth, did, in the hearing of divers peaceable citizens, utter loud noises and profane exclamations in one of the public streets, and did threaten to do great bodily injury to divers persons there being, to the great terror and disturbance of divers peaceable citizens in the neighborhood thereof residing, passing and being. And the said Sherman further complained that said Twombly and Page, at said Boston, on said 2d day of November, with divers other persons, whose names were to the complainant unknown, with force and arms in and upon one Caroline Sherman, in the peace of said commonwealth, then and there being, did make an assault, and her, the said Caroline, did then and there beat and illtreat, and did then and there with great force and violence break in one of the windows of the dwelling-house of the complainant, and did then and there threaten to tear down and demolish the same dwelling-house, and other wrongs and injuries then and there did, against the peace of said commonwealth and the form of the statute in such case made and provided. That to this complaint the said Twombly pleaded that he was not guilty; that upon the trial of the issue joined thereon he was found guilty, and was thereupon sentenced to pay \$3 33 as a fine to the commonwealth, with the costs of prosecution, taxed at \$4 77, and was further ordered to recognize with sufficient surety in the sum of \$100 for his appearance before the then next municipal court, of the city of Boston, in December following, to answer to such things as should then and there be objected against him on behalf of the said commonwealth, and that he should in the mean time keep the peace and be of good behavior towards all persons in said commonwealth, and especially towards the said Sherman, and that he should stand committed till the sentence be performed, with which sentence

Commonwealth v. Twombly.

said Twombly complied, and makes profert of an attested copy of the record of the said police court in the premises. The defendant proceeds in his said plea to aver, that he was the same identical person named in the said complaint of said James Sherman; that said James Sherman in the indictment mentioned, was the same person who made the said complaint; that said Caroline Sherman in the indictment mentioned, is the same person who is mentioned in the complaint; that the said offence, in the said indictment set forth, is the same offence which is alleged in the said complaint; that the said police court had jurisdiction of the matters contained in the said complaint, and had authority to try him therefor and to sentence him; and that the said judgment, proceedings and sentence of said police court were lawful, final and conclusive, and binding as well on said commonwealth as on him, said Twombly. The plea concludes with a verification, and a prayer of judgment whether the commonwealth ought further to prosecute or molest him on account of the premises.

To this plea the attorney for the commonwealth, without oyer of the said record having been prayed for or granted, demurs generally, and the defendant has joined in the demurrer; so that it is admitted by the pleadings, that the offence described in the plea is the same, for which the defendant now stands accused in this indictment; and it will follow, that if the police court had jurisdiction of that offence, the defendant will be entitled to his discharge from the present indictment. For, "whenever it is made to appear substantially by the record of a trial that the second prosecution of the same party is for the same offence, and that on the first prosecution judgment has been awarded and actually executed, the court giving the first judgment having jurisdiction over the person and the offence, the second prosecution must be barred. For otherwise there is no remedy to the party who may be exposed to two punishments for the same offence, contrary to the plainest principles of the common law." And Parker, Ch. J., in pronouncing the

opinion of the court, in the case of the *Commonwealth v. Goddard*, (13 Mass. R. 455), citing from 2 Hawk. c. 35, s. 10, the law there expressed, that "an acquittal in any court whatsoever, which has a jurisdiction of the case, is a bar of any subsequent prosecution for the same crime, as an acquittal in the highest court," adds that "*a fortiori*, should a conviction be good in such case." The plea asserts in fact, that the offence charged in the indictment is the same which was contained in the record of the police court. If that fact had been intended to be denied, oyer of the record would have been demanded, and the issue would have been taken upon it, which would be determined by a comparison, if referred to the court, of both records; or it might be shown by other evidence, if referred to the jury. If it had been intended to assert that the police court had exceeded its jurisdiction, because the assault and battery complained of, was of a high and aggravated kind; that would have been replied, and an issue would have been taken on that fact. If it could have been pretended, that the party colluded with the magistrate, that fact also might have been replied. For "fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal." Lord C. J. De Grey, in the case of the *Duchess of Kingston*, (20 St. Trials, note, 541.) For though a fraudulent judgment would be binding on him who was party to the fraud, it would not be binding on a stranger who, as he cannot come in to reverse the judgment, can only allege the fraud. In the case of the *Commonwealth v. Goddard*, it is said by the court, that "if the justice should, by mistake, proceed to punish an offence, which from its aggravated nature, ought to be inquired into and punished by a higher tribunal, it is always in the power of the government, by putting the jurisdiction in issue, to avoid the consequences of any mistake, or of any undue lenity." And finally, if such formal defects exist in the record of the judgment of the police court, as would render that judgment a nul-

Commonwealth v. Twombly.

lity, those would have been specially assigned. For nothing but a legal conviction, before a competent tribunal, is a bar to a second prosecution.

The only question which is presented by these pleadings is, whether the police court had jurisdiction of the matter of the complaint. I cannot doubt that if it were apparent on the record that the jurisdiction belonged to another tribunal, it would be my duty to say that the judgment was not lawful, and that it was no bar to the indictment. The second count in the complaint contains a charge against the defendant, that he with others committed an assault and battery upon the person of Caroline Sherman, and also a trespass on the dwelling-house of James Sherman. It is not charged in this count that these assaults were done in a riotous manner; and I cannot perceive that the police court had not jurisdiction of that offence. It is not clear that the first count intended to charge a riot, but it seems to me, that the offence described, substantially amounts to one; for it alleges that the defendant and others were, at the time, dangerous and disorderly persons; that intending to disturb the peace, they, in the hearing of divers peaceable citizens, uttered loud noises and profane exclamations, in one of the public streets, and did threaten to do great bodily injury to divers persons there being, to the great terror and disturbance of divers peaceable citizens in the neighborhood thereof residing, passing and being; and all against the peace and the statute in such case made and provided. Now in the language of Parker, Ch. J., in the case of the *Commonwealth v. Cunningham*, (13 Mass. R. 245), "I cannot say from this record, that the justice had not authority, by law, to try the defendant, and according to his discretion, upon the evidence, to acquit or convict him." The act of 1783, c. 51, "vesting certain powers in justices of the peace in criminal cases," expressly authorizes every justice of the peace within his county, "to punish by such fine, as is by the statute law of the commonwealth provided, all assaults and batteries that are not of a high and aggra-

vated nature, and to cause to be stayed and arrested all affrayers, rioters, disturbers and breakers of the peace, and to bind them by recognizance to appear at the next supreme judicial court, or court of general sessions of the peace. And also to require such persons to find sureties for their keeping the peace and being of good behavior until the sitting of the court they are to appear before, and to commit such persons as shall refuse to recognize and find such surety or sureties." They are also authorized, in the same section, "to require sureties for the good behavior of dangerous and disorderly persons."

Were there no other statute provision on this subject, it would be clear that a justice of the peace could not try and punish a person charged with the offence of committing a riot. It would be his duty to bind the offender over to a higher tribunal, to answer there for the offence. But this act contains no repealing clause, and it left the act of 4 W. & M., c. 6, unrepealed. It seems also to recognize that statute as being in force; as it is the one which enacted that justices of the peace may punish any person that shall assault or strike another, by a fine not exceeding twenty shillings. In order, however, to remove all doubts on this subject, if any existed, the legislature afterwards, by the act of 1794, c. 26, repealed the statute of the 4 W. & M., c. 6, which was passed in 1692, but expressly reenacted the provisions of the sixth section, in language, however, more accommodated to our republican system. That act enacts "that every justice of the peace within the county for which he may be commissioned, may cause to be stayed and arrested all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this commonwealth, or such others as may utter any menaces or threatening speeches, and upon view of such justice, confession of the delinquent, or other legal conviction of any such offence, shall require the offender to find sureties for his keeping the peace, and being of the good behavior; and in want thereof to commit him to prison, until he shall comply with

Commonwealth v. Twombly.

such requisition; and may further punish the breach of the peace in any person that shall assault or strike another, by fine to the commonwealth, not exceeding twenty shillings, and require sureties as aforesaid, or bind the offender to appear and answer for his offence at the next court of general sessions of the peace, as the nature or circumstances of the case may require." From the language used, I do not perceive that the last clause is to be restrained in its operation to the case of assaults on the person of another. If confidence may be reposed in the discretion of a justice, in relation to the punishment of an assault and battery; why not in relation to other breaches of the peace? By the expression, "or other legal conviction," it seems to be intended that the persons brought forward as affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively to the fear or terror of the peaceable citizens, or such others as may utter menaces or threatening speeches, shall be tried by the justice: because there can be no legal conviction without a trial. The circumstances may, on such trial, appear to be of a light character, not deserving heavy punishment, and it may be sufficient for the purposes of staying and arresting them, and also of punishment to require such offenders to find sureties for their good behavior; and in want thereof, to commit them to prison until they shall comply with such requisition. If, however, the justice should act under a mistake, or with undue lenity, and should proceed to punish an offence of an aggravated nature, and which ought to be tried and punished by a higher tribunal, the government may, according to the opinion of the supreme judicial court, in the case of Goddard, plead that fact, and so put the jurisdiction in issue. And with still greater propriety may it be shown, if the justice colluded with the offender, to defeat the just claims of the law.

Hence it will follow, that if the offence which is described in the first count of the complaint before the police court, amounted substantially to a riot, which seems to me to be evident, although

it wants the term *riotose*, I cannot say that it was not within the jurisdiction of that court. The defendant was charged with others with committing an assault and battery upon the person of Caroline Sherman, and with others with being a dangerous and disorderly person, with making loud noises, uttering profane exclamations in the public streets, and threatening speeches to divers peaceable persons, to their great terror, and to the great disturbance of the public peace. For these offences, on his trial and conviction before the police court, he was sentenced to pay a fine of three dollars and thirty-three cents, with costs of prosecution, and to give surety for keeping the peace, and being of the good behavior ; with which sentence he complied. And it does not appear from the pleadings that the assault was of a high and aggravated nature ; or that the court acting under a mistake with undue lenity, exceeded its jurisdiction ; or that any higher punishment should have been inflicted. It is most desirable that every judicial tribunal should keep within its own just limits, so that all, moving in their proper orbits, may produce general harmony. I cannot say that in considering this case, it has appeared to me to be wholly free from doubt. It depends on the construction of statutes, and I can easily see that different minds might come to different results. But it is certain that the defendant has been once tried and punished for his offence, by a judicial tribunal, acting undoubtedly with good faith, and under a full conviction that it had right to hear and determine the matter. Where a doubt may exist, that must operate in favor of the accused ; because it is better that a guilty man should escape the full measure of his punishment, than that a plain principle of law should be infringed. I am therefore bound in this case to adjudge, that the plea of the defendant is sufficient, and to overrule the demurrer.

FEBRUARY TERM, 1830.

COMMONWEALTH v. JONATHAN P. ROBINSON.

If, upon a settlement between a lessor and a lessee, under which an unexpired lease was to be given up by the lessor, upon the payment of a sum of money by the lessee, a misunderstanding arose as to the amount of money, and the lessee carried away the lease, the receipt for the money and the money offered in payment, such taking was matter of civil controversy only.

Where a defendant has voluntarily put his character in issue, and evidence for the prosecution has been introduced, the examination may extend to particular facts.

THIS was an indictment for larceny. The facts will appear in the charge to the jury.

Austin, for the commonwealth.

Samuel Hubbard and *Charles P. Curtis*, for the defendant.

THACHER, J. addressed the jury substantially as follows:—
The counsel for the parties having honorably, faithfully and eloquently performed their respective tasks, it remains for me to commit the case to you with all the brevity and distinctness which its nature and importance will admit. It is your province to decide upon the facts; but you are entitled to receive from the court such a clear delineation of the law as will make the course of your duty plain. The defendant is charged with a crime, which, if proved against him to your satisfaction, will not only deprive him of all standing as a man and a citizen, but subject him to an infamous punishment. While this serves to justify the almost unparalleled efforts of his counsel, it makes it the duty of all concerned not to do their work negligently. For we are all the ministers and servants of the law, and must follow where that directs, whether it be for the good or evil of the party on trial. The charge against the prisoner is, that he,

Commonwealth v. Robinson.

on the 9th of February, 1826, stole the sum of ninety dollars in bank bills, the property of William Lovering, in his possession, and in his dwelling-house. It is what is denominated in law a larceny, and being done in a dwelling-house, it is for that cause of an aggravated character. This offence is defined to be "the felonious taking of the goods of another, without his consent and against his will, and with intent to convert them to the use of the taker." It is not every wrongful taking of the goods of another, without his consent and against his will, and even with the intent to convert them to the use of the taker, that will constitute a felony. Because they may be taken under an erroneous supposition of right from the true owner, in which case, although it would be a trespass, yet it would not be a felony; and although a trespass is always included in a felony, yet it by no means follows, that every trespass is a felony. An officer, having a precept to attach the goods of A., takes the property of B., under a belief that they belong to A. It is a trespass in the officer, and the party whose goods have thus been taken, has his remedy against the officer and his employer, in a civil action. But if an officer, or any other person, should knowingly and fraudulently avail himself of a civil process to take the goods of another, it would be a felony, because the crime consists in the guilty intention.

"It is the mind," says Lord Hale (1 H. P. C. 508,) "that makes the taking of another's goods to be a felony, or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and though these circumstances are various and may sometimes deceive, yet regularly and ordinarily these circumstances following, direct in this case. If A., thinking he hath a title to the horse of B., seizeth it as his own, this makes it no felony but a trespass, because there is a pretence; but yet this may be but a trick to color a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it.

"If A. takes away the goods of B. openly, before him or other persons (otherwise than by apparent robbery,) this carries with it an evidence only of a trespass, because done openly in the presence of the owner, or of other persons that are known to the owner." (The judge then referred to the case of *Commonwealth v. Weld*, ante, p. 157.) In a modern case, tried in England before Bayley, J., the prisoner was convicted of stealing sundry articles of female apparel. He had entered the house in the night-time, through a window which was open, which belonged to a young girl whom he had seduced, and carried them to a barn, where he and the girl had been twice before. The jury thought the prisoner's object was to induce the girl to go again to the barn that he might meet her there, but that he did not mean ultimately to deprive her of the property. And it was held by the twelve judges that the taking was not felonious.¹ Here was a wrongful taking, coupled with a wicked intent, to induce the female to commit an unlawful act. But the intent not being, in the opinion of the jury, ultimately to deprive her of the apparel, it was not felony.

These cases serve to show that it is the duty of the jury to look into all the circumstances, and to form an opinion of the intent which actuated the party at the time, and whether it was to steal. However faulty a person may be, and however he may act against law in other respects, yet if, in the judgment of reason and charity, he did not mean to steal, or if it be doubtful in the mind of a jury whether that was his intent, it is their duty to acquit him. But you are always to remember that the law is no respecter of persons; and that it is to be meted out to all alike, whether they are rich or poor, whether they stand before you solitary and friendless strangers, or whether they are surrounded by an array of anxious and powerful friends. In all criminal accusations, it is the duty of the government to prove the guilt of the prisoner. In the present case, they rely

¹ *Dickinson's Case*, (Russ. & Ry. 420.)

mainly on the testimony of William Lovering, from whose possession the money is charged to have been taken. But the distance of time since the transaction took place, is a circumstance which cannot have escaped your notice. While it leads to the inquiry, why was not the complaint made at an earlier day, it is certainly most unfavorable for the elucidation of the truth. Had the defendant taken to flight, and remained absent for these four years, to avoid a prosecution; had the crime been committed, but the individual remained unknown, till recent circumstances had led to his discovery, it would sufficiently account for the delay. But the defendant in this case was well known, and it does not appear that he has absented himself for this cause for a day. Every fact was known to Lovering four years ago, and he had professional advice. If he knew that the defendant had stolen his money, he ought to have prosecuted him then, and it was an offence in him to compound and settle the prosecution. In the language of the law, the civil injury to the party was merged in the crime against the state. This court holds its monthly sessions, not only for the convenience of the public, to clear the jail, and to mete out justice speedily to offenders, but for the safety of parties accused; that complaints may be made soon after the commission of offences, and that they be tried while the facts are fresh in the memory of witnesses, and while they may be supposed to be under a proper impression. But the ends of justice are in great danger of being defeated by unreasonable delay. I may add, if a party, injured by the act of another, treats it at the time as a civil wrong, it is fair to infer that that was the true character of the transaction. And certainly it would be very dangerous to allow him, after four years have elapsed, to change his opinion and to call it a felony.

I do not think, however, that it is clear in this case that the prosecution has in any wise been instigated by Lovering. He has but obeyed the law in appearing as a witness, and it is for you to judge of his sincerity. But if you find that he is

Commonwealth v. Robinson.

contradicted by other witnesses, and has varied in his relation of facts at different times, the infirmity of memory, arising from advanced years and a tender constitution, will probably induce you to acquit him of any intentional wrong. But he has related the circumstances in a manner so positive, that while full credit may be allowed to his sincerity, it must be apparent that he has incurred great risk in speaking of a distant transaction with so much confidence. The circumstances have escaped from the recollection of Morse, Bullard and Carter, who are young men ; while they are confidently remembered and repeated by Mr. Lovering. Lovering is confident that he never consented to discharge the lease till he met Robinson at the corner of State street and Merchants Row ; and he denies that he ever conversed with Robinson respecting the bonus of fifty dollars, at any other place, or before that time. He also denies that he had ever conversed with Robinson about any other sum. And yet Caleb G. Bascom testifies, " that Lovering called into the counting-room one day, and that he and Robinson there made a bargain to cancel the lease on Robinson's payment of the rent to the end of the quarter, and for a bonus of a sum between twenty and thirty dollars." Now you must weigh the testimony of Bascom, which he has fortified by a voluntary affidavit, in the same scale of sound judgment with that of Lovering. There is a direct contradiction. One or the other has not spoken the truth. It may not be an intentional falsehood. But it is of great moment ; for if Bascom has spoken the truth in this particular, you will have a key to the conduct of the defendant at Lovering's house. If Robinson supposed that he was to pay only twenty-five dollars, and Lovering expected to receive fifty dollars, here was ground for a dispute to arise between the parties touching the settlement. It was a common case of a contract broken off by the misunderstanding of the parties, when they met to settle. And in taking up the money and papers, under these circumstances, and carrying them off, no felony was committed by Robinson, although there might

have been fault in the manner. Lovering says that Robinson was in a great passion at the time, and you will hardly think that he himself was cool. Lovering thought himself to be right, and that Robinson was wholly wrong ; and it was not a time for deliberation, nor for charitable constructions. And yet if you believe that there was a controversy at that time between Lovering and Robinson, respecting the sum to be paid, the idea of a felony is wholly excluded ; and the act of Robinson in taking the money and papers was matter of civil controversy, and not of criminal occupation.

In this connection, the testimony of William S. Whitney and William G. Parker of the relation of the transaction by Lovering in the store of Parker, in November or December last, and of David Rice, of a similar relation to him about the same time, in Sea street, is very material. Whitney says that Lovering did state "that Robinson laid the money and the key on the sideboard ; that he, Lovering, took it and counted it, and thereupon said it was not correct ; that it was not the sum agreed upon. Robinson said it was ; upon which a dispute arose, and Robinson took the money and lease, and put them into his pocket." In this statement Whitney is confirmed by William G. Parker, who was Lovering's tenant, and present at the time. He says that Lovering said "that he took out the lease, Robinson put down the money, Lovering took it and counted it, and it was short of the price agreed upon." David Rice says, that in the relation to him, Lovering stated "that Robinson counted out the money, Lovering took it and counted it, and found it twenty-five dollars short of what they had agreed upon. Some altercation took place on the contradiction ; Robinson grabbed the money, and told him he would not have anything till he got it at the end of a lawsuit." Lovering being called a second time, denied that he had, in either of these conversations, stated to these witnesses that the money was short, and that hence arose the controversy. And yet here are three witnesses, who swear directly and positively to this most material contradiction.

Commonwealth v. Robinson.

It is for you to determine whether these witnesses have sworn to falsehoods, or whether Lovering's memory is infirm and not to be trusted in this matter. If Lovering is now correct, it will follow that Robinson, knowing that he was to pay ninety dollars, actually counted it out ; that he covered it with the lease, and after he had got Lovering's receipt, he clandestinely stole the money. And yet, in his subsequent conduct, he treated the affair as a civil injury, and authorized Morse to settle it as such. That gentleman also regarded it as a civil injury, calling it at the time, "a quarrelsome affair between Lovering and his tenant." Upon the final settlement Lovering was well satisfied, and now says, "that he then supposed there was an end of it forever." I shall not advert to various other discrepancies in the testimony which are relied upon by the learned counsel in their respective arguments, and which are to be considered by you in making up your verdict. But if the scales should remain equally suspended in your minds, you may then take into consideration the testimony which the defendant has brought forward of his general character and standing as a man and a citizen, at the time this crime is alleged to have been committed. "In doubtful cases," says Parsons, Ch. J., in the case of the *Commonwealth v. Hardy*, (2 Mass. R. 317,) "a good general character, clearly established, ought to have weight with a jury, but it ought not to prevail against the positive testimony of credible witnesses. Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecutor may offer witnesses to disprove their testimony. But it is not competent for the prosecutor to go into this inquiry, until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts." For my own part, I cannot see that any evidence tending to show the general character of a defendant ought to be excluded. He may say, I think you have accused me of a crime which is contrary to my character, and to all the habits of my life. You say that four years ago, I stole the sum of ninety

dollars. At that time I was a commission merchant in this city, of fair standing. I had a store of goods in my possession. I had the command of thousands of dollars, entrusted to my care and management, by a bank in another state. I was a husband, a father, I was attached to the society of my wife and children ; I devoted myself to their improvement and happiness. I was temperate, industrious, and enjoyed the confidence and esteem of all who knew me, and was never before stained with suspicion. To refuse to a party, at such a moment, the advantage of his good name, would be to deny to him the benefit of his virtues at the most critical period of his life, and when they would be of more worth to him than all other human things. Here then you will consider the testimony respecting the defendant's good character, which was detailed to you by twenty-seven witnesses, whom he called as to that point.

But from this is to be deducted the testimony of Robert T. Paine and Samuel D. Parker, as to the impression which they formed of the general character of the defendant, in relation to the transaction between him and the late Henry Hill. As it fell from their lips without objection to the relation by the defendant's counsel, it certainly bore hard upon his morals ; for it looked like an attempt on his part to take advantage of an old man, and in fact, to commit a downright fraud. But then you will consider that Robinson did not deny, either to Paine or to Parker, that he had the deed, nor did he pretend to either that he had paid the consideration of the estate. He did not admit the contract, as stated by them, to be the one which existed in truth between him and Henry Hill. You are to consider, also, that that gentleman is dead, and that you cannot hear the circumstances from him, from the late Judge Dawes, or from any other of the witnesses to the contract. And if the testimony of Samuel S. Lewis is correct, old Hill was with Robinson afterwards, negotiating not only respecting the reconveyance of this estate, but respecting the sale to him of another. And it is very certain that Robinson continued to be Hill's tenant for

Commonwealth v. Dockham.

nine months afterwards. So that you must weigh all things discreetly and impartially, and consider that the great ends of justice require that no man should be convicted of a crime on doubtful circumstances; for thereby an innocent man might perchance be convicted. To convict an innocent man of an infamous crime would be a stain on the public justice, and a blot upon the commonwealth. Allusion has been made, by both the learned counsel, in their arguments, to the motives which led to this prosecution. But if anything has led to it at this period, other than the essential interests of justice, let me here say, that this court is not the instrument of private malice, but the minister of good for all the citizens of this community, whatever may be their denomination in politics or religion. Individuals and parties are fleeting; they follow each other in succession, as one wave follows another; but the foundations of justice are fixed, and will last as long as the great Author of Nature.

The jury rendered a verdict of acquittal without leaving their seats.

JULY TERM, 1830.

COMMONWEALTH *v.* MOULTON H. DOCKHAM.

When a misnomer in an indictment is pleaded in abatement, it is not a good replication that the defendant is the same person mentioned in the indictment.

THE defendant was indicted, at the May term, upon the license law, by the name of Huntoon M. Dockham. To the indictment he pleaded in abatement the misnomer that his name was Moulton H. Dockham, and that by that name he had always been known and called. To this plea the counsel for the commonwealth, Austin, replied, that he was the same

identical person. And to this replication the defendant demurred in law, and the attorney for the commonwealth joined in the demurrer, so that the question was upon the sufficiency of the plea.

THACHER, J. The defendant must be described in the indictment by his christian name and surname, and by his addition. If there be a doubt which one of two names is his real surname, the second may be added in the indictment after an *alias dictus*. (Bro. Misnom. 47.) And if a man is known by two names, that fact may be replied to a plea in abatement of misnomer, the plea saying, "that he is as well known by the one name as the other."

It is true, that if a man be indicted for the robbery or murder of John A. Stiles, and acquitted, and afterwards indicted for the robbery or murder of John A. Nokes, yet he may plead *autrefois acquit*, and aver it to be the same person, notwithstanding the variance in the surname; for a man may have divers surnames, and he may aver, *que conus per l'un nosme et l'autre*. (26 Assiz. 15 Coron. 2 H. P. C. 244.) But it is not an answer to a plea of misnomer, that he is the same identical person, because it is the right of the party to be prosecuted by his true name. If he waives the defect, and answers to the wrong name, he can never afterwards deny *that* to be his true name. It will also embarrass him if he should wish to plead the acquittal or conviction to a new indictment. Therefore the judgment in this case is, that the defendant's plea is sufficient, and that the indictment be quashed.

The defendant was discharged.

AUGUST TERM, 1830.

COMMONWEALTH v. JOSEPH FRANCIS.

The statute of 1804, c. 131, (Rev. St. c. 126,) by the term vessel does not mean a small, unfinished boat, still in the hands of the builder, and unfit for use.

Setting fire to an unfinished boat in a shop, with intent to burn the building, is a misdemeanor at common law, but unless some permanent part of the building be burned, it does not come under the statute of 1804, c. 131.

Under the statute of 1804, c. 131, a vessel lies "within the body of the county," when it lies in the water which flows within the county, and not upon the high seas.

THIS was an indictment for malicious burning. The facts in the case and the points made by counsel, will appear in the following charge to the jury.

Austin, for the commonwealth.

S. D. Parker and *T. Parsons*, for the defendant.

THACHER, J. I stated to you, at the adjournment of the court on Saturday evening, that you were entitled to the best assistance of the court to enable you to bring this cause to a result which would reflect credit on the public justice. That it should have excited great interest cannot be matter of surprise, when it is considered that the defendant, who has heretofore sustained an unblemished reputation for moral worth, is on trial before you for an offence which is of a most odious character. Society joins in abhorrence of the malicious incendiary; and it is the duty of all concerned in the administration of the public justice, and of all good citizens, to use their endeavors to bring an offender of this description to justice. But I think that I need not caution you not to permit the odium of an offence to supply the defect of evidence. You must view the case with the intellectual eye, and not through the medium of the passions.

And the only result on which you will be able hereafter to reflect with entire satisfaction will be that in which you have meted impartial justice, both to the individual who is on trial, and to the society of which you are members. A jury being obliged, in the performance of their duty in criminal cases, to pronounce a verdict both on the law and the fact; you have heard much from the learned counsel, respecting the nature of the crime which is charged in the indictment. On this subject, which is strictly matter of law, you will be justified in your consciences to be guided by the instructions of the court. I shall, therefore, briefly and simply state to you my opinion.

It is understood that the defendant is on trial for one offence, although it is described in the indictment in eight different ways, each being charged to be against the peace of the commonwealth, and the form of the statute in that case enacted. There is nothing surprising in this number of counts. It is designed to meet the evidence, and to avoid the oppression which would arise from several distinct trials. In the first count it is charged, that the defendant did wilfully and maliciously burn a certain building not belonging to himself, which was occupied by Whittemore & Holbrook, as a boat-builder's shop, with intent to injure and destroy their property. If on a view of the evidence, you should believe that the defendant did maliciously set fire to that building, then you will return a general verdict of guilty; because this comprehends every description of the offence which is contained in the other counts. But before you can find such a verdict, you must be satisfied from the evidence that the building was actually set on fire, and that at least it was partially burnt. The offence will be consummated if the fire took effect on the building, although it was immediately extinguished. If you should not be satisfied that the building was burnt, you will then be obliged to look for the true description of the offence to the other counts of the indictment.

In the second count, he is charged with burning a certain

vessel, called a lap-streaked boat, lying within the body of this county; and in the third count, the boat is described as an unfinished vessel. I am not satisfied that the boat in this case was a vessel within the meaning of the statute. Whether it was a vessel or not, is not to depend on the fact whether it had been launched and used for its proper purpose. But if it was only partially built, it must be left to your good sense to say whether it was a vessel or not. I think, too, that the legislature meant by the expression, "lying within the body of any county," that the vessel should be lying in the water which flows within the body of a county, in distinction from one upon the high seas, and out of the body of a county. If this expression was not used for this purpose, it was wholly without use; because all offences must be proved to be done within the body of the county, to give jurisdiction to the court where the trial is to be had. But in construing penal statutes, all hard and forced constructions are to be avoided. And every doubt is to be resolved most favorably for the party on trial. And therefore it is my opinion, that by the term "vessel," the legislature did not mean a small boat of the description of the one in the present case, in an unfinished state, which was still in the hands of the builder, and wholly unfit for carry men or goods on water, or for any purpose for which such a vehicle is intended.

In the fourth, fifth and sixth counts, the defendant is charged with maliciously setting fire to certain piles of lumber and wood. Now every expression in a statute must be taken in its plain and popular meaning. And as there has been no evidence in this case that any piles of wood or lumber have been set on fire, I think you will, of course, acquit the defendant on these counts. The offence described in the seventh and eighth counts is briefly this. That the defendant wilfully and maliciously intended to burn the building of one Ephraim Snow, and for that purpose wilfully and unlawfully set fire to an unfinished boat in the same, by means of which the building was in great danger of being burned. Maliciously to set fire to the building

of another is against the statute ; and maliciously to intend to set fire to the building of another, and in pursuance of that malicious and unlawful intent to apply fire to a boat in the same, or to other combustible matter, which would be a clear manifestation of such unlawful intent, is a misdemeanor at common law. We have the authority of Lord Mansfield and the court of King's Bench, in England, which has also been recognized at law by our supreme judicial court, in the case of *Harrington*, (3 Pick. R. 26.) Lord Mansfield says, "that the intent may make an act, innocent in itself, criminal ; nor is the completion of an act criminal in itself necessary to constitute criminality. Is it no offence to set fire to a train of gunpowder, with intent to burn a house, because by accident or the interposition of another, the mischief was prevented ? So long as an act rests in bare intention, it is not punishable by our laws ; but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done ; and if it is coupled with an unlawful intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable."

This rule was applied to the case of one *Scofield*, who was indicted for maliciously intending to burn the house of one James Ramsay, and in pursuance of that unlawful intent, for putting a lighted wax candle in a closet, under and adjoining certain wooden stairs in the house, and contiguous to other wooden buildings, and maliciously placing about the lighted wax candle, matches, and small pieces of wood, and other combustibles, with a wicked and malicious intention to set fire to said house. The malicious intent manifested by the act of setting the lighted wax candle in that situation, was decided, after learned and full consideration, to be a criminal offence, and he was punished very severely by fine and imprisonment.¹ It has been decided, that an endeavor to provoke another to commit

¹ *Rex v. Scofield*, (3 Caldecot's R. 397.)

Commonwealth v. Francis.

the misdemeanor of sending a challenge to fight, is itself a misdemeanor, particularly where such provocation was given by a libellous writing, and where the intent was to do the party bodily harm, and to break the peace. (6 East, 461.) And it is said by Parsons, Ch. J., in *Commonwealth v. Kingsbury*, (5 Mass. R. 108,) "that an intent to commit a misdemeanor manifested by some overt act, is a misdemeanor."

In the case now on trial, if no building was burned, if no vessel lying within the body of this county was burned, and if no piles of lumber or wood within the meaning of the statute were burned, still, if you believe that there was, on the part of the defendant, a malicious intent to burn the boat-builders' shop of Whittemore & Holbrook, which belonged to Snow, which intent was manifested by setting fire to an unfinished boat, or other combustible material within the building, it was undoubtedly an offence at common law, and so against the peace, although it was not within the statute; and therefore you will be bound, in such case, to find the defendant guilty on the seventh and eighth counts of the indictment, and to acquit him of the residue. This being the law, you will next inquire, what offence, if any, has been proved to have been committed, in the present instance. The testimony of Amos Whittemore, Samuel G. Holbrook and some others, goes to this point. Does it appear, then, that the building was burned? Unless some part of the building was burned which was permanently fixed to it, and made part of the inheritance, and which could not lawfully be removed either by the tenant or by an executor, the building cannot be said to have been burned. As between landlord and tenant, I have no doubt, that the cradle in this case might be removed by the latter. The blocks on which it rested were nailed to the floor by the tenants, in carrying on their business, for a temporary purpose, and might be taken up and removed at their pleasure. A fixture is something permanently annexed to the freehold, and made part of it. Neither tenant nor executor may remove it. If, in consequence of set-

ting fire to this cradle, the floor of the building had been burned in ever so slight degree, the offence would have been consummated under the statute. But no part of the cradle was burned, only part of the boat which was fixed on it, and part of the frame or mould on which the boat was built. The fire did not touch the permanent part of the cradle, which was nailed to the floor and shores. But it is clear that the building was forcibly entered in the night-time. Deliberate preparation was made, and the boat was set on fire by means of the lighted lamps. The fire had made progress, part of the frame was burnt, and the boat screw, and, in all probability if not for the timely discovery, the building would have soon been enveloped in flames, and no one can say what would have been the extent of the conflagration. The law infers that to be the intent of the perpetrator of a deed, which is the natural and necessary consequence of the deed. The destruction of the building was in this case a natural and necessary consequence. To say that the boat only was intended to be burned is so refined and limited a view of the act, that it contradicts the plain dictates of common sense. And therefore, if you believe the testimony of the witnesses, I think you will find no difficulty in believing, also, that some person must have maliciously set fire to the boat with the wicked intent to destroy the building.

The great question in this case is, whether this offence has been committed by the party on trial. If, after a full, deliberate, and candid examination of the evidence, you shall believe in your consciences that he did commit this offence, it is my duty to say to you that you are bound by the oath which you have taken, and by your regard to the country which you represent, to say so, notwithstanding the fair and honorable standing which the defendant has hitherto held in the estimation of the community. The hypothesis on the part of the government is, that the defendant, entertaining for Whittemore and Holbrook feelings of resentment for having left his employment and established themselves as rival boat-builders on a

where the business was formerly conducted by himself, procured the lamps and gimlets and the sticking lamp for the purpose; that being acquainted with the spot, and having viewed it previously, he took a favorable opportunity, and having entered the shop in the night-time by force, he set fire to the boat by means of the lighted lamps; that having accomplished the nefarious deed, he, to avoid suspicion and discovery, took Coombs's pilot boat which lay near to the shop at the time, and transported himself to the railway and platform of Pratt and Cushing which was at some distance, and was seen on the platform at half past three o'clock on that morning. To support this hypothesis, no direct testimony is produced. The deed was done in the silence and darkness of the night, and in the absence of all eye-witnesses.

This is a case of no unfrequent occurrence. Most crimes are committed in secret: murder, forgery, and particularly arson. Those who are bent on guilt seek concealment; and if no offender could be convicted of a crime except by the direct testimony of an eye or ear-witness, many deeds of deepest guilt would be left unpunished by human tribunals. Proof of a fact is often of a presumptive nature, derived from circumstances more or less numerous, and more or less tending to convince the mind. These circumstances, when combined together, often lead to a clear and satisfactory result. A chain of circumstances, each proved by eye or ear-witnesses, each capable of being contradicted or disproved by the party on whom they are brought to operate, all submitted to the plain sense of a jury of intelligent men, is often more to be relied upon than the direct and positive assertions of a witness who may not be intelligent, or who may be dishonest. If one material fact in the chain fails in proof the whole fails. You are also to view all the circumstances together from whence an inference is asked to be drawn, and inquire whether, consistently with the truth of the whole, the party may not be innocent. For if all the circumstances, though true, still leave a reasonable doubt of the guilt

of the accused, he must be acquitted. It is then your duty to weigh and consider, and so to come to a result. The golden rule is to be applied to such a case. You must mete to the party on trial the same measure which you would expect should be meted to you in like circumstances. It may seem a wild attempt to lay down any rule for the proof of guilt by circumstantial evidence: all the acts of the party, all things that explain or throw light on those acts, all the acts of others relative to the affair, that come to his knowledge and may influence him, his friendships and enmities, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretences, and explanations, his looks, his speech, his silence where he was called to speak, everything which tends to establish the connection between all these particulars, every circumstance precedent, concomitant and subsequent, — become parts of circumstantial evidence, and are proper to be weighed by a jury.

Having given to you the rules of law, I might here leave you to apply them to the evidence. But considering its voluminous character, the time which has elapsed during the trial, and since it commenced, and the length and perplexity of the arguments and statements of the counsel, I think it my duty to lay before you, from my minutes, the evidence of the witnesses which apply to the several points in the case. 1. As to the disposition which the defendant entertained towards Whittemore and Holbrook. The latter served his apprenticeship with the defendant, and both had for several years worked in his employ as journeymen. They are both said to be excellent workmen. Both testify, that they had served him so long, and knew him so well, that they felt reluctant to inform him that they had determined to commence business for themselves. And yet what is more reasonable and proper, than that at their period of life and seeking their own good, they should adopt this course? And they well might, from their character and previous conduct, expect encouragement not only from the defendant, but

Commonwealth v. Francis.

from all good citizens. John Wade first informed the defendant of the intention of Whittemore and Holbrook to commence business on their own account. 2. The next circumstance is, that defendant was perfectly acquainted with the location of the premises, and was seen by Wilkinson near to the spot the preceding afternoon. 3. The discovery of the lamps, gimlets and sticking candlestick, which were used to set the boat on fire, is another circumstance. The ownership of these articles is justly considered by the defendant's counsel as of great moment. The lamps, they say, were the whole hinge of the case. If you do not believe that these belonged to him, there is no case. As soon as Darracott saw these at the spot, on the morning of the fire, he advised Whittemore to go to the hardware stores in the city, and ascertain the purchaser. And he said to Whittemore, as he did to his friend, the defendant, that the man who did the deed would be sure to be found out.

As soon as suspicion fell upon the defendant, the first inquiry which was addressed to him by Darracott and by his friend and relative, Wade, related to these lamps. The government say that these lamps belonged to him. And if these lamps did not belong to him, and if he did not place them under the boat, it must be confessed that there is in this case a most extraordinary combination of circumstances to cause suspicion to fall on the devoted head of an innocent man. That he bought these three lamps and four gimlets at the store of Simpkins, some weeks before, is proved by the testimony of S. G. Eaton. The fact of a purchase of lamps and gimlets like these, the defendant admitted in conversation with Simpkins, Darracott, and Wade at different times. Eaton speaks confidently of these very lamps from their peculiar construction, their rarity, and from the time he had observed them in the store. His testimony is confirmed by that of Simpkins, Perigon and Elliot. And it derives strength from the great reluctance which he discovered, when he was first questioned on the subject, to name the defendant, or to admit the idea of his guilt. The non-pro-

duction of the lamps by the defendant, and his utter inability to show what had become of them, tend to prove their identity. Although several weeks had elapsed from the purchase, no one of his family ever saw them in his house, and it happens that the only one which was found in his possession was by his apprentice, Gideon Jennings, found in a room over his counting room, wrapped up in some oakum. For what purpose did the defendant purchase these lamps, and what became of them? The defendant does not attempt to account for them. His counsel say, that he cannot account for them, and that it is unreasonable to expect it. But of this you must judge. The defendant admitted to Levi Whitcomb, that he formerly used in his shop such a sticking candlestick as was found attached to the boat at the time the fire was discovered. 4. Fragments of the Palladium, in which the lamps appeared to have been wrapped, were found on the spot; and it is in evidence that the defendant was a subscriber to this newspaper. 5. The defendant was found at Pratt and Cushing's ways that morning at half past three o'clock. And Coombs's pilot boat, which had been taken from along the side of Whittemore & Holbrook's store, or in a dock near to it, was found in the morning on the wharf of Larkin Snow, which is near to those ways. The argument of the government is, that a man who had perpetrated such a deed, would choose to leave the spot in the most secret manner; and that being familiarly acquainted with the situation, the defendant easily found this boat, and availed himself of it for this purpose. 6. Francis was not seen by any one in his own house, or known to leave it that morning. It is also in evidence, that after breakfast, he retired to his chamber to rest after the labors of the night and morning. It is undoubtedly true, that the defendant has accounted for his early rising that morning. The counsel for the government argue, that had he contemplated the deed, he would seek for a favorable opportunity, which was furnished to him by the absence of his

wife from home, and by the fact that he was obliged to rise at an early hour that morning.

The counsel for the defendant rely upon various topics, partly of fact and partly of argument, to relieve him from the consequences of this suspicion. 1. They deny that the lamps and gimlets are sufficiently proved to authorize the belief that they belonged to the defendant, and they insist that there is no witness who testifies that he saw him in possession of the pilot-boat. 2. They deny that he had any motive to commit the crime, or that he was actuated by rivalry, and they insist that he had full employment. 3. They contend, that the implements used to effect the burning of the boat were unusual, and that it was absurd to suppose that he would have taken those lamps which he purchased at Simpkins's store, for this purpose. 4. That he was unskilful in using a boat, and that it is utterly improbable that he would have trusted himself in a boat at such time of the night, and in the dark, with nothing to guide him but a stave. 5. If he had committed this deed, he would have retired to his own house afterwards, nor would he have admitted to any one, that he had bought those lamps. 6. The appearance of one of the lamps indicates that it had been in use before, and that it was not a new one. 7. He would probably have affected more disguise and concealment. Whereas all his conduct denoted freedom from consciousness of any criminality. 8. He made no attempt to escape. 9. And lastly, his excellent character is utterly inconsistent with the idea of his guilt.

It remains for you to decide upon the weight of the various grounds of suspicion, which are proved in this case, and which rest upon the defendant. If, upon a candid and intelligent view of the evidence, you believe that he committed this offence, then you must find him guilty, and leave the testimony of his former good character to weigh in the mind of the court, in mitigating the sentence of the law. But if the scales of guilt and innocence are equally balanced in your minds, then

Commonwealth v. Nightingale.

you will resort to the evidence of his character, which has been so freely given in his behalf. In this hour of trial, in the very crisis of his fate, his former good character may be to him of inestimable worth. It is for you to say, whether you believe that such a man, in such circumstances of life, and for so slight a temptation, would have committed a deed which indicates the extreme of malice and depravity. If he is the guilty man who committed the deed, he will carry in his breast "the worm which will never die, the fire which will never be quenched," whether you pronounce him innocent or guilty. The weighty responsibility of this case has been devolved upon you by the laws of the land. If you in your consciences believe him to be guilty, let no false tenderness induce you to swerve from the obligation of your oath. But if you doubt his being guilty, and can pronounce his acquittal, so as to restore him to his family and to society, the blessing of him who is ready to perish will surely come upon you.

The jury returned a verdict of acquittal.

SEPTEMBER TERM, 1830.

COMMONWEALTH v. JOSIAH NIGHTINGALE, APPELLANT.

The municipal court has cognizance of cases of infringement of the by-laws of the city of Boston.

When a complaint for a breach of the city by-laws did not set forth the ordinance at length, it was nevertheless *held* to be sufficient in point of form. The city ordinance, passed November 13, 1826, for the due regulation of the market, is valid and binding upon the citizens of the commonwealth.

In a complaint under this ordinance, it is competent for the jury to settle from the evidence, whether the defendant resides in a town in the vicinity of Boston.

When the defendant offered for sale in the market, produce of his own and neighboring farms, it was *held* that the jury were to decide whether it was intended as a cover for selling produce not of that description.

THIS was an appeal from the judgment of the police court of

Commonwealth v. Nightingale.

the city of Boston, rendered August 11, 1830, upon the complaint of Caleb Hayward, of said Boston, clerk of Faneuil Hall Market, in which he says that the said Nightingale, on the same 11th day of August, A. D., 1830, at Boston aforesaid, with force and arms, did with a certain wagon occupy a stand in South Market street, in said Boston, without the permission of the said Hayward, the clerk of Faneuil Hall Market in said Boston, for the purpose of vending in said South Market street, commodities not being the produce of his own farm or of some farm in his neighborhood; and that the said Nightingale was then and now is an inhabitant of the town of Quincy, in the county of Norfolk, in said commonwealth, the said town of Quincy being in the vicinity of said city of Boston, and the said Nightingale being then and there ordered by the said Hayward to remove forthwith from said street did not so remove, but refused, against the peace of said commonwealth, and the forms of the statute of said commonwealth, and by-law of said city, in such case made and provided. Upon his trial in the police court the said Nightingale was found guilty, and sentenced to pay a fine of five dollars, and costs of prosecution, taxed at two dollars and ninety-eight cents. He was tried in this court, upon the issue which was joined in the court below. In support of the complaint the attorney for the commonwealth read to the jury the first and eighth sections of the city ordinance "for the due regulation of the market," which was passed November 13, 1826, which were as follows, namely: 1. "That the limits of Faneuil Hall Market shall be the lower floor and porches of the building recently erected, and called Faneuil Hall Market, and the streets on each side thereof, called North Market street, and South Market street." 8. "That no inhabitant of the city of Boston, or of any town in the vicinity thereof, not offering for sale the produce of his own farm, or of some farm in his neighborhood, shall at any season of the year, without the permission of the clerk of the Faneuil Hall Market, be suffered to occupy any stand, with cart, sleigh, or otherwise,

for the purpose of vending commodities in either of the streets mentioned in the first section of this ordinance, and every such person, on being ordered so to do by the said clerk, shall forthwith remove from and out of said streets."

It was admitted that Caleb Hayward was clerk of Faneuil Hall Market, and had been in that office for several years. The said Hayward testified that Josiah Nightingale, the appellant, took a stand in South Market street on the 11th day of August, 1830, at sunrise, with a wagon, and continued to occupy the same till eleven of the clock in the forenoon. He offered for sale carcasses of mutton and lamb, which he disposed of in the course of that morning. The witness ordered the appellant to leave the street, which was within the limits of the market, as defined in the first section of the ordinance, but he refused to remove from the same. This was early in that morning. After the appellant had occupied the stand for two or three hours, the witness again ordered him to leave the street, and told him, in case of his compliance, no complaint should be entered against him. But the appellant again refused to leave the stand. The witness further testified that the appellant lived in Quincy at the time, and that on the 9th day of the same month of August he was in the market with his wagon, offering for sale carcasses of mutton, which he said he had bought at the cattle market in Brighton; and he said further that he had been driven out of the market once, and he would now see if he was to be driven also out of the town. Upon his cross-examination the witness said, that neither the city government nor he himself had established a rule as to what was to be regarded the "vicinity" of Boston. Being further asked, whether he had not permitted one Faxon, from Newton, and others, to occupy stands in the market with their wagons and produce, and the questions being objected to by the attorney for the commonwealth, the court decided that the question was irrelevant, and the witness was not permitted to answer it. Jeremiah Nightingale was then called as a witness

for the prosecution, and testified on oath, that the appellant, his father, lived at Quincy, on his farm there, on which is a slaughter-house, and that he came to town with the appellant on that day. That the appellant had in his wagon two carcasses of mutton and five of lambs, that the sheep were bought at Brighton some months before, and had been kept by him on his farm since that time, and that the lambs were bought at Hingham on the week preceding. Besides the mutton and lamb, the load contained twenty or thirty boxes of berries, of different sizes, varying from one to six quarts each, which berries had been picked on his father's farm. He also had ten or twelve pairs of chickens, which were raised partly on his own farm, and partly on farms in the neighborhood. These articles were offered for sale by him, and sold with the rest of the load. As the witness was driving to Boston on that day with his father, the latter said that he meant to try the law.

Timothy Fuller, for the appellant, insisted, 1. That the complaint was defective, in that it had not set forth the by-law, on which it was founded, at full length. 2. That the by-law was void in its own nature, in that it was partial, and did not operate upon all the citizens of the commonwealth equally; and because it makes a distinction between the citizens of Boston and its vicinity and the inhabitants of distant towns in the commonwealth. 3. That the by-law is void for uncertainty, in not declaring what towns are to be comprehended within the vicinity of Boston. It is also defective in that it is left to the discretion of the clerk of the market to require the removal of persons, whereas the by-law should have been expressed so as that every citizen might determine for himself. He further argued, from the testimony, that the appellant did not violate the by-law, inasmuch as his wagon contained at the time the produce of his own farm, perhaps to half the value; and he moved the judge so to direct the jury.

Austin, for the commonwealth.

THACHER, J., in committing the case to the jury, instructed them, 1. That the court was competent to try the case, notwithstanding it was to enforce a by-law of the city, to the breach of which a pecuniary penalty was annexed. 2. That the complaint was sufficient in point of form. 3. That the ordinance of the city on which it was founded, was a good and wholesome regulation, and binding on the citizens, and on all persons who came to the market with their carts and wagons to offer produce for sale. 4. That it was a salutary regulation, and not a restraint of trade.

He further instructed the jury, that whether it was matter of law or fact, it belonged to them to settle, from the evidence, whether the appellant was an inhabitant of a town in the vicinity of Boston; and whether he came to the market at the time stated, offering for sale the produce of his own farm, or of some farm in his neighborhood. That it was true that he might have some of the productions of his own farm; and yet if these were but a cover to screen him from the operation of the ordinance, and his intent was to sell produce not of his own farm, nor of any farm in his neighborhood, he would be within the meaning and mischief against which the ordinance was intended to guard. That it belonged to the jury to consider all that the appellant did and all that he said at the time. Surely nothing that had a tendency either to prove or to disprove the issue was to be considered irrelevant or to be neglected by them. To these several opinions and instructions, the counsel for the appellant excepted in point of law.

The jury found the appellant guilty, after which, and before judgment, the appellant moved for a new trial, and assigned the following reasons, viz.

1. Because the verdict was against law and the evidence in the case; it being proved, and not contradicted or denied, that a large and principal part of the load brought by the appellant to market at the time, and offered for sale, was the produce of his own farm and of farms in his neighborhood. 2. Because it

Commonwealth v. Nightingale.

was proved that all the load so brought and offered for sale, except what was the produce of the defendant's farm, and of his neighbors living in the same town, and within two miles, was the produce of a farm or farms about four miles distant therefrom, and consisted of only five lambs, being a small and inconsiderable proportion of the entire load. 3. Because the judge instructed the jury that the by-law on which the complaint was founded, was sufficiently certain, and that it was not necessary that any limit or definition of the term "vicinity of Boston," as mentioned in said by-law, should be made. 4. Because the judge, among other things, charged the jury that if they believed the defendant came to market on the occasion aforesaid, for the purpose of selling the mutton or lamb contained in the wagon and not the produce of his own farm, or of farms in his neighborhood, they ought to find a verdict against him, provided he lived in the vicinity of Boston, and took and kept the stand contrary to the direction of the clerk of the market, though it was proved and not contradicted, that he also offered for sale, and actually sold poultry, berries and mutton, the produce of his own farm.

The appellant also moved, in arrest of judgment, and assigned the following causes, viz. 1. Because the by-law relied upon, and on which the verdict was rendered, was not duly and legally set forth in the complaint. 2. Because the said by-law is void, being uncertain and vague in its language; unequal, and unjust, and is restraint of trade and of the rights and freedom of the citizens. 3. Because no offence or violation of any law binding on the defendant, is set out in the complaint. 4. Because said complaint and by-law, and all the proceedings in the cause are illegal, unjust and void.

The counsel for the appellant was heard upon these motions on the 14th day of October, 1830. The attorney for the commonwealth did not reply. On the 8th day of November following the following opinion was delivered.

THACHER, J. This complaint is founded upon the first and

eighth sections of an ordinance of this city "for the due regulation of the market," which was passed November 13th, 1826. The witnesses testified, at the trial, that the appellant did, on the 11th day of August, 1830, with a wagon, occupy a stand in South Market street, without the permission of Caleb Hayward, the clerk of Faneuil Hall Market, and did there sell mutton and lamb; that he belonged to the town of Quincy at the time; and that being repeatedly ordered by the clerk to remove from that street he refused to do so. I am not called upon, nor is it my duty, to discuss the policy of this ordinance. If it was within the authority of the city government to make it, it is the duty of this court to enforce it. From a period coeval with the settlement of this city, there has been established in it a public market. The right to establish a market has not been questioned in this trial; and considering the city as having that right, it follows that they may establish such good and wholesome regulations as shall be found necessary for its good government; that all may come to it freely, whether to buy or to sell, and that order may prevail during the market hours. It was left to the jury to settle at the trial, whether the appellant was the inhabitant of a town in the vicinity of Boston, and whether he occupied with his wagon, a stand within the limits of the market for the purpose of vending commodities which were not the produce of his own farm, or of some farm in his neighborhood, and without the permission of the clerk of the market. The jury were also instructed, that though a part of his load might have consisted in the produce of his own farm, or of some farm in his neighborhood, yet if they believed, from the evidence, that the appellant came to vend commodities which were not the produce of his own farm, or of some farm in his neighborhood, and that that portion of his load which was the produce of his farm was but a cover to screen him from the operation of the law, and that his intent was to sell produce not of his own farm, nor of any farm in his neighborhood, he would still be within the meaning and mischief against which

the ordinance was intended to guard. The counsel for the appellant, in his argument upon the motions now before the court, has contended that the question of vicinity was one of law, and not of fact; and therefore that it was incorrect in the judge to leave that to be settled by the jury. In criminal cases, the jury are to judge both of the law and the fact; but they are entitled to the opinion and advice of the court in coming to a right result as to both. The evidence of the contents of the load, and of the declarations of the appellant at the time, being thus left to the jury, they, by their verdict established the truth of the complaint. I do not say, that as the evidence was balanced, if the jury had come to a different result, I should have been dissatisfied with it, so far as to wish to disturb their verdict. But as it belonged to them to weigh the evidence, and to establish the truth or falsehood of the complaint, their verdict is so far binding on the court, that if the complaint is sufficient in point of form, and is founded on a valid ordinance, and if the trial has been according to the rules of law, I shall deem it to be my duty to give effect to it by affirming the judgment of the court below.

The counsel for the appellant has contended, in his argument, that the complaint is essentially defective in form, in not setting forth the ordinance extensively, or so much of it at least as relates to this case. He also insisted that it ought not to have been tried in this court by a judge and jurors who were inhabitants of Boston, and so interested in the result. The fifth section of the act of 1824, c. 28, has placed prosecutions for violations of the by-laws and ordinances of the city of Boston, on like ground, in point of form, with offences committed against any general law of the commonwealth. All that is necessary, in such case, is to describe the act done, "fully and plainly, substantially and formally," according to the letter and spirit of the law, and to conclude with averring that it is against the form of the statute of the commonwealth in that case made and provided. The party is to answer for that act which is

deemed to be a sufficient intimation of the law, against which he is supposed to have offended. If the act is prohibited by law, he is presumed to know the law. To simplify the forms of proceedings, and the language of the complaint is favorable to the public justice, and surely not prejudicial to the party complained of. I think that the complaint, in this case, is according to this section of the law of 1824, c. 28. The appellant is charged with standing with his cart, within the limits of the market, and without the permission of the clerk, for the purpose of vending commodities of a certain description, and for refusing to quit the same place, when ordered to do so by the clerk ; and it is averred to be against the statute of the commonwealth, and the by-law of the city in that case enacted. The act prohibited by the ordinance seems to be the one which is set forth in the complaint. And I am therefore of the opinion that the complaint is sufficient in point of form.

As to the right of this court to take cognizance of this case, it has been settled by the supreme judicial court, that in a case like the present, in which the commonwealth prosecutes for a penalty, arising under an alleged breach of a by-law of this city, the judge of this court and the jurors are the legal and competent tribunal to hear and determine the same, notwithstanding they are inhabitants of Boston.¹ The city is not a party to the prosecution, nor liable for the costs. The inhabitants have no claim to a dividend of the penalty. It cannot be denied that the city, in its corporate capacity, and the inhabitants have an interest in the observance of the city laws, and that the enforcement of them tends to the common welfare : but it is that species of interest which does not in legal contemplation disqualify from the office of judgment. If the judge has a direct interest in the event, even to ever so small an amount, or if he has prejudged the case, he may not sit in judgment, and it would be contrary to his duty to do so. But no such interest exists in

¹ *Commonwealth v. Worcester*, (3 Pick. 462.) *Ib. ante*, p. 100.

the present case ; and however happy we should be, to be relieved from the burden of settling a contested controversy, we must submit to our lot, and take cognizance of the matter. But the counsel for the appellant insists, that even if the court should decide that the complaint is sufficient in form, and the court should sustain the jurisdiction of it, yet the ordinance on which it is founded is wanting in the requisites of a law, to make it binding on the citizens as a rule of conduct. Hence the duty is imposed upon us to weigh the ordinance, and to determine upon its validity. And doing this, it must always be recollected that laws made for a particular occasion, must be considered with reference to that occasion. The object of this ordinance was to designate a spot, to which the inhabitants of all the towns in the commonwealth, and even from other states, whether living in Boston, in its vicinity, or coming from the remotest distance, might come freely to the market, without paying any tax for the privilege, and to offer for sale there the produce of their own farms, and of other farms in their neighborhood. Those who come to the market from places not in the vicinity, but remote from this city, are authorized to bring any produce, whether of their own farms, or derived from any other source. But this could not be effected if the inhabitants of Boston and its vicinity, taking advantage of their near residence, should be permitted to occupy stands with their carts in this particular spot, for the purpose of vending the produce which they purchased from others, with the intention of reselling the same in the market at a profit. The evil was sensibly felt before the removal of the market to its present site, when it was confined to old Faneuil Hall and Dock Square. This class of venders were accustomed, at the earliest hour of the morning, and even before daylight, to preoccupy the best stands in the market and Dock Square, to the exclusion of the country-dealer, compelling him to stand at a distance, in places not convenient, or to move about the town with his load ; thus presenting the most favorable opportunity to those who lived by

forestalling the market, to buy the produce at a low rate. The remedy for this evil was by a by-law, which was passed March 10, 1817,¹ which authorized the clerks of the market, to whom these persons were known, to order them to remove, whenever it was necessary in their judgment to do so. Such removal would not be necessary at all times, but it was necessary that the clerk should at all times have power to order the removal. It is true that this put a power into the hands of the clerk which he might use indiscreetly and capriciously; and it has been argued that the exercise of this power ought not to depend on the caprice and perhaps partiality of the officer. But it was considered to be more convenient to leave this matter to the conduct of the clerk, under the circumstances of each case, than to make an absolute regulation prohibiting all persons of a certain description from standing in these streets at any time. Because it might be convenient at many, and perhaps at most times, not to order the removal; just as it is left to the wharfingers of the different wharves in this city to regulate the lying of vessels at the same. If any wharfinger should be guilty of caprice and partiality, it would be for the interest of the corporation immediately to deprive him of his office. In almost every office some latitude of discretion is left to the officer, in the performance of his duty; and it must be presumed, until the contrary shall appear, that he will exercise it prudently, and not according to a wild caprice. We cannot presume anything against the clerk of the market in this case. We are only to settle whether it has been legally shown that the appellant has committed an offence against a binding ordinance.

If a portion of the market is assigned to all the inhabitants of the commonwealth, where they may stand with their carts, and freely vend the produce of their own farms, it is surely a reasonable and necessary regulation to provide against the monopoly of this station by any one or more persons: otherwise the

¹ See also the by-law of the city of Boston, which was passed on this subject, June 9th, 1813.

Commonwealth v. Nightingale.

intention of the city might be frustrated by a few interested individuals. This regulation may not be evaded. Like other laws, made for greater occasions, it is to be observed in good faith. I deem it, therefore, on consideration, correct, that it was left to the jury to consider the intent of the appellant at the time. If he actually came with his wagon to vend foreign produce, he shall not be permitted to evade the law because he had in his load at the time some few articles also which were the produce of his own farm. And it being, in my opinion, the right of the city to prescribe that a certain portion of the market shall be free to all the citizens, who come to vend the produce of their own farms, it will follow that they may, at any and at all times, exclude from this place all other persons not answering to this description. The ordinance has defined the limits of the market, and I see no objection to the taking of part of a broad and spacious highway, which was laid out with reference to the accommodation of the market, provided no inconvenient obstruction is thereby caused to the right of passing. But whether North and South Market streets are public highways, was not shown at the trial, nor was the fact material to the issue. But by the act of 1809, c. 28, the mayor and aldermen are empowered to appoint suitable places in the streets or squares of the city, in which all wagons, carts, sleds, or other carriages shall be directed to stand.¹ The effect of the ordinance is not to exclude from the market an inhabitant of Boston or its vicinity, from offering to sell in the market any productions which are not of his own farm; but to require him to take such other stand in the market as is assigned to him for that purpose. If, for this purpose, it should be necessary for him to occupy a stall in the market-house, it is undoubtedly competent for the city, who have erected the building at a great expense, to require him to pay a reasonable rent for the accommodation. But he is not obliged to come to the market, unless

¹ Charter and Laws of Boston, 64.

Hoch v. Lord.

he is satisfied with the terms. If the regulations should, however, be so inconvenient in their operation, as to exclude or discourage the inhabitants of the country from coming freely to the market, the city will be the first to feel the evil and to find a remedy. But if the regulations should be generally oppressive, either to our own citizens or to strangers, there is reserved to the legislature, by the city charter, the right to annul them.¹

Being of the opinion that the complaint is sufficient in point of form, that the ordinance is valid, and that the verdict of the jury has properly settled the fact, and also being further of opinion that the reasons assigned in the motions are not sufficient to authorize me to set aside the verdict, or to arrest the judgment, the motion is overruled, and the judgment of the police court is affirmed, with additional costs.

JANUARY TERM, 1831.

JOHN HOCH, PETITIONER, v. NANCY JONES LORD.

The surety of the putative father of a bastard child, in a bond conditioned to support the mother and child, upon the death of such father, has a right to petition the court for a discharge from the bond, and to support the same by his affidavit.

THACHER, J. The petitioner was surety of one John Henry Schweiringin, in a bond dated November 15, 1823, to one Nancy Jones Lord, conditioned to pay to her the sum of four dollars per week for four weeks, from the 3d day of October, 1823, and also the further sum of one dollar and thirty-three cents, weekly, from the same 3d day of October, until the further order of this court. Through the carelessness of the scrivener, the bond is

¹ See the 15th section of the city charter.

Hoch v. Lord.

not pursuant to the order of the court ; for the weekly sum of one dollar and thirty-three cents was to commence from the expiration of the first four weeks, nor does it appear in the condition for what cause the money was ordered to be paid. Neither this court nor any other can order money to be paid, or any other act to be done, unless the same is authorized by law. But the parties to this process have not noticed the fault in the bond, and it would be more properly considered in an action upon the bond itself. The object of the petition is to be relieved from the payment of any further sum to the said Nancy J. Lord. It was filed at the last December term, and it was agreed that the final order of the court should be entered as of the 11th day of that month. The case was continued that the parties might respectively prepare and file affidavits, at this term, in support of their several allegations. And upon the motion of the counsel for the respondent, it was ordered, that said Hoch should answer interrogatories to be proposed to him on the part of the respondent, if he should choose so to do. At the November term of this court, A. D. 1823, the said Schweiringin was, upon the trial of the complaint of said Nancy, adjudged to be the reputed father of a certain female bastard child, and was ordered to stand charged with the maintenance of the child with the assistance of said Nancy, the mother, in manner following, namely, to pay to said Nancy four dollars for each week for the first four weeks, from and after the 3d day of October, 1823, being the day of the birth of said child, and one dollar and thirty-three cents, from the 31st day of October, 1823, unto the time of that judgment, and thenceforth until the further order of this court. He was also to give security to said Nancy, in the sum of five hundred dollars, to perform the foregoing order, and to give security to save the inhabitants of the city of Boston free from charge for the maintenance of the said child.

By the act of 1785, c. 66, (Rev. St. c. 49,) on which the process was founded, the putative father is to stand charged with the maintenance of the child with the assistance of the

Hoch v. Lord.

mother, "as the justices of the court shall order." Under this provision, and to meet subsequent changes in the condition of the parents or child, it has been usual to order the father to pay a certain sum weekly to the mother, "until the further order of the court," as was done in this case. Upon the hearing at this term, the counsel for the respondent objected to the reading of the affidavit of the petitioner, which objection was overruled, and the affidavit was read. It was also objected by the respondent's counsel, that the petitioner had no right to present this petition, that he is a mere stranger, and that the court has no power to relieve him. But it being shown to the court, that John H. Schweiringin is deceased, and that there is no one to represent his estate, it seems to me that the petitioner's relation of surety is a sufficient proof of interest to authorize him to show any facts to the court as a ground for a new order. It has also been ingeniously argued by the counsel for the respondent, that, as the father is to stand charged with the maintenance of the child with the assistance of the mother, which is both a natural and moral duty, the maintenance on his part is a perpetual obligation, commensurate with its necessity, and that he cannot be discharged from it. If, in these cases, to the putative father was committed the custody of the child, there would be great force in the argument. But by the wisdom and humanity of the law, the custody of the child remains with the mother, and therefore the obligation of nurture and maintenance practically belongs to her. The law, having regard to the good of the child, prefers to rely upon the maternal sentiment. The voice of nature speaks in her with truth and certainty, and she knows that the child is the fruit of her body. But in many cases, the putative father might entertain doubts on this subject. He cannot know with certainty that the child is his; and therefore, if it were in all cases delivered over to his custody, he might neglect the duty, and the child might be left to perish from want of necessary sustenance and care. It is stated, by the petitioner in his affidavit, and the fact is not denied, that

Hoch v. Lord.

there has already been paid to the respondent, at various times, under the original order, five hundred dollars and forty-eight cents, which rather exceeds the penalty of the bond. It is also stated, and not denied, that the respondent is possessed of some property in her own right. And although by affidavits filed on her part, it appears that she is of a tender constitution, yet the child is now arrived at an age which no longer requires that personal attendance which is incident to earlier periods of infancy, and ought, at no very distant period, to be placed in a situation where her support and education will be provided for without charge to her mother. It is also stated, in the affidavit of the petitioner, that he received of John H. Schweiringin, in November, 1823, seven hundred dollars, which sum was to indemnify him for all the money which he had before at any time paid on said Schweiringin's account, or should pay on said bond, or in any matter connected therewith, and also to compensate him for his time and trouble. He commenced his quarterly payments in February, 1824, and has already paid to the respondent \$484 12. He has also paid \$69 82 on account of said Schweiringin, and for incidental expenses; and there remains in his hands \$148 06, from which he claims to deduct a reasonable compensation to himself. The said petitioner is under a further bond to the city of Boston, in the penalty of \$200, given pursuant to the order of this court, to save the inhabitants harmless and free from charge for the maintenance of the said bastard child; which bond is of indefinite duration, and Hoch may hereafter be required to make payments to the city on that account.

Considering the amount which has already been paid to the respondent in behalf of the said Schweiringin, and of the further liability of the petitioner to the city; considering also the situation of the mother, and the age of the child, I am of the opinion that Schweiringin has performed the duty of maintenance which is required in these cases, and that it is reasonable that a further order should be made in the premises, by which the estate

Commonwealth v. Chase.

of the said Schweiringin shall be relieved from any further charges in this matter. Therefore, it is ordered by this court, upon a full hearing of the parties, their respective allegations and proofs, and the arguments of their learned counsel, that from and after the eleventh day of December last past, all further weekly payments to said Nancy Jones Lord by said John H. Schweiringin, or by any person representing him or his estate, shall cease ; and that from and after that time neither he, said John H. Schweiringin, nor his estate, nor the said John Hoch, shall be liable or required to pay any further sum to her, said Nancy, in the premises.

Austin, for the petitioner.

S. D. Parker, for the respondent.

MAY TERM, 1831.

COMMONWEALTH v. JERUSA CHASE.

Where a defendant pleaded guilty to an indictment, and the prosecuting officer did not move for sentence, but laid the indictment on file, and the defendant was permitted to go at large, on a recognizance to appear when sent for ; and at a future day, after several intervening terms of the court, the prosecuting officer moved for sentence : it was *held*, that the indictment was still in force ; and that the defendant was rightly sentenced upon her plea.

THE defendant was indicted at the January term of the court, 1830, for stealing from a dwelling-house, and upon her arraignment, pleaded guilty. The prosecuting officer did not move for sentence and the indictment was laid on file, the defendant entering into recognizance with sureties to appear before the court when sent for. At the present term of the court, the defendant was indicted for a larceny, and upon her trial, was acquitted. The county attorney then moved for sentence upon the first mentioned indictment.

Commonwealth v. Chase.

S. D. Parker, for the defendant, contended, 1. That the proceedings in the court at the January term were full and complete ; and that they amounted to a sentence. 2. That the matter having been acted upon and finished, could not be brought forward *per saltum*, but it should have been continued from term to term.

Austin, for the commonwealth.

THACHER, J. The indictment against Jerusha Chase was found at the January term of this court, 1830. She pleaded guilty to the same, and sentence would have been pronounced at that time, but upon the application of her friends, and with the consent of the attorney of the commonwealth, she was permitted, upon her recognizance for her appearance in this court whenever she should be called for, to go at large. It has sometimes been practised in this court, in cases of peculiar interest, and in the hope that the party would avoid the commission of any offence afterwards, to discharge him on a recognizance of this description. The effect is, that no sentence will ever be pronounced against him, if he shall behave himself well afterwards, and avoid any further violation of the law. But I cannot doubt the court may, on motion, have the party brought in and sentenced at any subsequent period. For what was the duty of the court to do at any one time, cannot cease to be its duty by delay. The judgment is postponed only, and it is in the discretion of the attorney for the commonwealth, to move at any time afterwards for the appearance of the party, according to the condition of the recognizance.

In the case of Jerusha Chase, the defendant, the question is not on the validity of the recognizance ; but whether the former proceedings have discharged her, so that no further judgment can be produced on the record. What are the rights of a party called into court under such circumstances ? He may admit the conviction, and plead a pardon for the offence : or, he may deny that he is the same person who is named in the indict-

ment ; in which case, the government must prove his identity, like any other material fact, by verdict of the jury. Or, he may move in arrest of judgment for the insufficiency of the record.¹ But this woman, upon being brought into court, by another name, on being asked why she should not be sentenced on this indictment, admitted her identity. It appears, therefore, by the record, that public justice has not been satisfied ; and that no punishment has been inflicted for her violation of the law, in the matter whereof she stands convicted.

But it is asked by her counsel, where an indictment has been suffered to sleep upon the files of the court for several terms, and no notice has been taken of it on the record or docket to keep it alive, whether it is competent to call it up at a future period, and to proceed upon it as on a living process ? But I do not understand that a prosecution like this can ever be said to be dead in law. If it should be said, however, to be hard measure to pronounce judgment after it has been suspended for years ; I answer, that the party might at any time have appeared in court, and demanded the judgment of law. It has been delayed from tenderness and humanity, and not because it had ceased to be the right of the government to claim the judgment. By mutual consent, therefore, the judgment has been delayed till this time, and this consent takes away all error in the proceedings.² Sir Walter Raleigh was executed on a sentence which had been passed upon him fifteen years before. But he did not claim to be relieved from his fate on the ground of the lapse of time between his judgment and the final demand of the warrant of execution, but on the ground of

¹ It was justly regarded a tyrannical act on the part of James II. upon the arrest of the Duke of Monmouth, who had been attainted by act of parliament for high treason, to issue forthwith a warrant for his execution. No judicial proceedings were had ; no opportunity was allowed to him to deny his identity, or to contest the validity of the proceedings : and he was immediately executed, without the observance of any forms of law.

² 3 Co. 40, Dormer's Case.

Commonwealth v. Harding.

an implied pardon, arising from a commission which had been issued to him by the king, to command an expedition to a foreign country, and in which was contained an authority over the lives of others. It was argued, that such a commission could not have issued to one dead in law, and that the grant of such a commission must have operated to restore the party to the privileges of a free subject. Undoubtedly, Sir Walter had hard measure dealt out to him by his vain and weak sovereign.

By the record in this case, the defendant stands convicted of a crime, and no sufficient reason is shown, why the sentence should not follow the conviction. It is as much the duty of the court, to render judgment against a person convicted of a crime, and within its power, as to secure to such person a fair trial. It would be against reason and justice to do otherwise.¹

The defendant was sentenced to five days solitary-imprisonment and six months in the house of correction.

SEPTEMBER TERM, 1831.

COMMONWEALTH, UPON THE COMPLAINT OF THE CITY MARSHAL, v. CHESTER HARDING, APPELLANT.

Where, under a complaint for an alleged violation of a by-law of the city of Boston, prohibiting the occupation of any part of Washington street as a stand for hourly coaches, the court was asked to decide upon an agreed statement of facts, whether an offence had been committed, and it appeared

¹ At the next November term of the supreme judicial court, the whole matter was brought before the court by the defendant upon a motion for a writ of *certiorari*, and was argued by *S. D. Parker*, for the defendant, and by *Daniel Davis*, solicitor general, for the commonwealth. Chief Justice SHAW, delivered an opinion, in which it was understood the other members of the court concurred, that the judgment pronounced by the municipal court was correct, and a writ of *certiorari* was refused. It may not be improper to remark, in this connection, that the principles of the above decision have often been recognized in our courts.

that the alleged by-law was an order of the mayor and aldermen, without the concurrence of the city council ; it was *held*, that such order was not a by-law, and that the question presented by the statement of facts, whether a nuisance at common law had been committed, could not be determined under such a complaint ; and it was also *held*, that the question whether a nuisance at common law had been committed, could only be determined by a jury.

THACHER, J. At the request of the counsel for the parties, this case has been heard upon the record and the agreed statement of facts. The complaint charges that the said Harding, on the 25th day of December, 1830, was the driver of a certain hourly coach, called the Roxbury Hourly, and did occupy a part of Washington street, in said Boston with the same, as a stand for said hourly coach, against the peace of said commonwealth, the form of the statute of said commonwealth, and the by-law of the city of Boston. It is apparent that this complaint is for an alleged violation of a by-law of this city. The questions which would arise at the trial would be, whether the fact charged was true, and whether it was in violation of a by-law. the validity of the law would be for the consideration of the court, the question of fact for the jury. A by-law may be for the prevention of a nuisance, and if that was the object of this law, the convenience or inconvenience of the regulation must have entered into the mind of the makers at the time it was enacted, and if it is a valid by-law, no evidence would be admissible at the trial, as to that point. It is true, if the law carried in its face anything unreasonable, that would go to the question of its validity ; for a by-law must be reasonable, as well as within the authority of its makers, to be binding on the citizens. The law on which this complaint rests, is an order of the mayor and aldermen, made on the 29th day of November, 1830, " that from and after the fifteenth day of December then next, no part of Washington street shall be occupied as a stand for hourly coaches, that the proprietors of the coaches, accustomed to stand therein, be notified of this order, and that the city marshal, under the direction of the mayor, be instructed to

carry this order into effect." To occupy a place as a stand, according to the true meaning of this order, supposes something permanent in the station, where these hourly coaches should be, or claim to be and remain, at the pleasure and convenience of the owners and drivers. It cannot be supposed that it was intended to forbid them to stop in the streets to take in or discharge passengers. For this is a right common to the owners of all carriages, public or private. And though it may be that to allow this liberty to hourly and half hourly coaches might, and probably would cause an inconvenience to the streets, yet that would be balanced by the multitudes passing to and from the city, and by the activity which it would give to business. It would not be decent to suppose that the legislature of the commonwealth would make a law to interdict the common and usual use of the highway. In fact, it is not clear to my mind, that such law, if enacted, would be binding; inasmuch as it would be an utterly improvident exercise of authority, and against common right. But for a much stronger reason, cannot individuals or a municipality make such a law? It was a maxim of the Twelve Tables, that societies might make what by-laws they please among themselves, provided they do not interfere with the public laws.¹

But the supposed law in this case is merely an order of the mayor and aldermen, without the concurrence of the common council, and not containing any penalty for its violation. According to the fifteenth section of the city charter, the authority to make by-laws is vested in the mayor and aldermen and the common council, and to be exercised by a concurrent vote, each board having a negative on the other. It is manifest, therefore, that the order in this case is not a by-law of the city. And it would certainly be against the duty of the court to pronounce a judgment against a citizen, unless it was clear from the record that he had violated a binding law. It may be thought,

¹ XII Tab. VIII.

however, that the right of the mayor and aldermen to pass this order is derived from that provision in the thirteenth section of the city charter, which declares "that the administration of police, together with the executive power of the said corporation generally, together also with all the powers heretofore vested in the selectmen of the town of Boston, either by the general laws of this commonwealth, by particular laws, relative to the powers and duties of said selectmen, or by the usages, votes, or by-laws of said town, shall be, and hereby are vested in the mayor and aldermen, as fully and amply as if the same were specially enumerated."¹ Under this general provision, the mayor and aldermen may officially exercise all the powers of the old board of selectmen, except where they have been modified by particular provisions of the charter, or by subsequent acts of the legislature. The selectmen represented the municipality, or the inhabitants of the town in their corporate right. But now, the mayor and aldermen and the common council are the municipality. The right to represent the city, no longer belongs to either board separately, except where it is expressly so provided by the charter, or other act of the legislature, or by an ordinance, or joint act of the city government. By the second section of the act of 1809, c. 28, entitled "an act in addition to the several acts, now in force, to regulate the paving of streets in the town of Boston, and for removing obstructions in the same," it is enacted "that the selectmen of the town of Boston shall be, and they hereby are empowered to appoint suitable places in the streets or squares of said town, in which all wagons, carts, sleds, or other carriages shall be directed to stand." Now, admitting that this act is a sufficient authority to enable the mayor and aldermen to prescribe, without the concurrence of the common council, where hourly coaches may stand, such order will amount only to a license for carriages of this description to stand in a particular place, which would ex-

¹ Act of 1821, c. 110.

Commonwealth v. Harding.

empt the driver or owner from being made liable, as for a nuisance, for interrupting the highway. But it would still be necessary to declare, by a valid ordinance or by-law, what penalty shall be incurred for the violation of such order. The order of the mayor and aldermen, in this case, does not undertake to prescribe where the hourly coaches shall stand. It simply declares that no part of Washington street shall be occupied for such purpose. Now it is highly proper that the mayor and aldermen should have the power to appoint suitable stands for carts and carriages, and to determine where it will be most for the public convenience to allow those persons to be accommodated, who come to the city with wagons and horses, to offer for sale wood, barrels, cider, and other heavy and bulky commodities. And, with the exception of such licensed spots, no man is at liberty to place his cart or carriage in the highway, to the annoyance of the public, and such act would be deemed a nuisance at common law.

The counsel for the parties, waiving all objections to the form of the complaint, have addressed their respective arguments to the court, and are desirous to have its opinion on the question, whether it appears, from the facts agreed, that an offence has been committed. They have agreed "that the said Harding was, on the day mentioned, the driver of one of three coaches and horses, running from Boston to Roxbury, and back again every other hour, from 9 o'clock A. M., to 5 o'clock P. M., during the winter season, and during the summer season, from 8 o'clock, A. M., to 7 o'clock, P. M.; that the passages of all which make one coach to arrive at and to depart from Boston with passengers, three times in every two hours of every day, Sundays excepted. The owners of the coaches are lessees, by a lease still in force, of a house situated in a court, near Washington street, an apartment in which, is for the accommodation of passengers going to Roxbury, at three hundred dollars per year. Most of the passengers going in said coaches, stop, and are taken up in said Washing-

ton street. The said owners have, and pay a rent for, a right to stop with their horses and carriages, in the yard of the Mansion House Tavern, in Milk street, in which yard the said Harding, and the other drivers of the said coaches, after landing their passengers in Washington street and elsewhere, go and remain with their coaches and horses, until the time arrives for returning to Roxbury, when they proceed into Washington street, in front of the passageway, near to the house of said owners, for the purpose of taking up such passengers as are ready to go to Roxbury. The time occupied by all the coaches together, in taking up and landing passengers, as aforesaid, in said Washington street, is from twelve to twenty per cent. of all the time between the hours aforesaid of each day; and the time so occupied in taking up and landing said passengers at each trip, is not greater than is necessary for that purpose. And it is further agreed by the parties, that each may produce evidence as to the public inconvenience or convenience, occasioned by said coaches, if the court shall deem such testimony proper and legal.

The counsel for the complainant argued that these facts show an illegal occupation of the highway in Washington street, for the purpose of carrying on a certain business, which occupancy or stand there by these coaches, can be proved to be injurious to individuals, and inconvenient to the public.¹ The counsel for the defendant, insisted that the complaint is not founded on any law of binding obligation; that the facts show no illegal act; and that it could be proved that the establishment of hourly coaches between Roxbury and Boston, is a very great public accommodation, notwithstanding the interruption which they necessarily cause to the passage of the streets; and that the convenience far exceeds any real or imaginary annoyance

¹ He cited *Rex v. Russell*, (6 East, 427); *Com. v. Passmore*, (1 Serg. & Rawle, 217). Also a case against *Dogget and others*, decided in the supreme judicial court of this commonwealth, March, 1793, reported in the *Columbian Centinel*.

to individuals, or interruption to the public. He further stated that one hundred thousand passengers were annually accommodated by these carriages, between Roxbury and Boston.

It thus seems to be the object of the parties to obtain the opinion of the court, whether the act complained of is or is not a common nuisance ; for it is not agreed in the statement of facts, that it is a public convenience, or otherwise. But, whether an act amounts to a nuisance or not, is never matter of law to be settled by the court, but a question of fact to be proved by the verdict of the jury. It does not belong to the court, in this case, to say whether the defendant has unlawfully, and without necessity, obstructed the free passage of the public through Washington street. Neither would it be satisfactory, for the court to undertake to settle a fact of this nature. The jury are always considered the best judges of facts. Whether the act complained of was a nuisance, whether it resulted from design or accident, whether it was beneficial to the public or otherwise, whether if injurious to individuals, it is still justified by general convenience or necessity, are questions most proper for the consideration of twelve men, who shall, under the sanction of an oath, declare what they believe to be true. I am, therefore, of the opinion, that I ought not to undertake to decide whether the facts agreed prove the defendant guilty of a nuisance at common law, nor can that point be decided in this form of complaint ; that must remain to be settled, according to the forms of law, and most consistently with the rights both of the defendant and the government, under an indictment against the present defendant and his employers, for a common nuisance, if the grand jury shall hereafter return a bill. It is not in point of form or substance, within the act of 1799, c. 42, s. 7, that subjects a person to a forfeiture of one dollar, for suffering his carriage to remain in any street for more than one hour, without the permission of the surveyor of highways ; to be recovered in an action of debt before a justice of the peace, and to be prosecuted by the particular direction and order of

Commonwealth v. Jackson.

the selectmen. These several particulars must be set forth in the record, to bring a party within the provision of that law, and no one of them is contained in the present complaint. And it appearing to me that no by-law of the city has been violated, and that no judgment can be rendered against the defendant upon the complaint in this case, even if the facts stated in it are true, the complaint must be dismissed, and the defendant be discharged from his recognizance.

The defendant was discharged.

APRIL TERM, 1832.

COMMONWEALTH v. LUCINDA JACKSON, APPELLANT.

Where two persons were joined in a complaint in the police court, and charged severally with distinct offences, and no objection was taken for this cause in that court; upon the trial of an appeal in the municipal court in the same case, it was *held*, that the proceedings for such cause would not be quashed.

Where there was a joinder of a felony with a misdemeanor under the statute, requiring different evidence to support the several charges, and different punishments in case of conviction, the misjoinder was *held* to be fatal.

THIS was an appeal from a judgment rendered by the police court of this city, against the appellant and Pamela Dusenbury. The original complaint contained three distinct charges, viz. 1. For stealing bank bills and silver coin to the amount of twenty-five dollars. 2. That they severally were, on the 28th day of January, A. D. 1832, pilferers, and that at divers times within six months before that time, they did pilfer and steal from divers persons. 3. That on the same 28th day of January, A. D. 1832, they severally were wanton and lascivious persons in speech, conduct, and behavior. Upon the trial in the police court, both were acquitted of the first and second charges, but were convicted of the third charge, and sentenced each to hard labor in the house of correction for two

Commonwealth v. Jackson.

months. From this judgment Lucinda Jackson appealed to this court.

S. D. Parker, for the appellant, moved at the March term, that the proceedings might be quashed, because two persons were jointly charged in this complaint, and because the offences charged were different in their nature, and each requiring different evidence, and a separate punishment.

Austin, for the commonwealth.

THACHER, J. Every crime which may be in its nature joint may be so laid. But though it is unusual to join two or more persons together for such offences as are contained in the second and third counts of this complaint, because the offence of one is not the offence of the other, nor is the guilt of one to be imputed to the other; yet as they are charged severally, and as the judge must, at the trial, pass on the guilt of each, I do not find that this joinder of persons is fatal. "Touching the joining of persons and offences in one indictment," says Sir Matthew Hale, (2 H. P. C. 173,) "if there be one offender and several capital offences by him, they may be all contained in one indictment, as burglary and larceny; larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment. If there be several offenders that commit the same offences, though in law they are several offences in relation to the several offenders, (21 E. 4,) yet they may be joined in one indictment, as if several commit a robbery, or a burglary, or murder. And it is common experience at this day, that twenty persons may be indicted for keeping disorderly houses, or bawdy houses, and they are daily convicted upon such indictment, for the word *separaliter* makes them several indictments." It does not appear that an objection was made to this complaint for this cause in the court below; and therefore, although I perceive that inconvenience may arise to a party from joining him with others in an offence, which is in its nature several, and great care

should be always taken by the court to secure to the accused a fair trial, yet this objection cannot avail to quash the proceedings in this stage of the case.

As to the second objection, it is undoubtedly true, that a misjoinder of counts in a declaration makes the process bad *ab initio* both in civil and criminal cases. As such misjoinder is a defect in substance, it may be taken advantage of by general demurrer, by motion in arrest of judgment, or in a writ of error. (4 T. R. 347 ; 2 B. & P. 424 ; 5 East, 150 ; 1 M. & S. 355 ; 1 New Rep. 43 ; 6 East, 333 ; 6 Taunt. 179.) And it seems by plea in abatement, (Archbold's Digest, 155,) in civil cases several causes of action may be joined, where they admit the same plea and a like judgment. And therefore assumpsit and trover cannot be joined in the same action. *Holms v. Taylor*, (2 Lev. 101) ; *Bage v. Bromuel*, (3 Lev. 99.) It is no objection, in arrest of judgment, that the indictment charges several offences, not even in the case of felonies, much less in case of misdemeanors. As it respects the latter, the case of *Rex v. Benfield*, (2 Burr. 980,) is clear on this point. "The case of felonies," says Buller, J., in *Young v. The King, in Error*, (3 T. R. 98,) admits of a different consideration ; even in such cases it is no objection after verdict on a motion in arrest of judgment. On the face of an indictment every count imports to be for a different offence, and is charged as at different times. And it does not appear, on the record, whether the offences are or are not distinct. But if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge to the jury ; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are matters of prudence and discretion, which judges exercise in order to give a prisoner a fair trial. If the judge who tries the prisoner, does not discover it in time, I think he may put the prosecutor to make his election on which charge

Commonwealth v. Pollard.

he will proceed. If the case has gone to the length of a verdict, it is no objection in arrest of judgment." Grose, J., in the same case says, "that he is clearly of opinion that it is no objection in arrest of judgment, that the indictment charges several offences. It is no objection even in the case of felonies, still less is it so in misdemeanors." Where therefore several felonies are charged in the same indictment, the party ought to make his objection before the trial. For if a verdict should be rendered against him, without the exception having been taken, he will be considered to have waived the objection. But where there is, as in the present case, a joinder of a felony with a misdemeanor under the statute, not only requiring different evidence to support the several charges, but different punishments in case of conviction, the misjoinder is fatal.¹ The whole record being before us, and it appearing that there was an incurable defect in the same originally, I am of opinion that the defendant's motion ought to prevail.

The complaint was dismissed.

FEBRUARY TERM, 1833.

COMMONWEALTH v. JOSHUA H. POLLARD.

A person selling a chance in a lottery, and retaining in his own hands the ticket or other evidence of the chance, sells a ticket within the meaning of the statute of 1825, c. 184.

THE defendant was indicted for selling to Richard Smith, on the 9th day of February, 1833, a certain lottery-ticket in a lot-

¹ Archbold, in his Pleading in C. C. 29, says, — The defendant must not be charged with having committed two or more offences in any one count of the indictment; for instance, one count cannot charge the defendant with having committed a murder and a robbery, or the like. The only exceptions to this rule are to be found in indictments for burglary, in which it is usual to charge the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended.

tery, which was not authorized by any law of this commonwealth, contrary to the statute of 1825, c. 184. Richard Smith was called as a witness for the prosecution. When put on the stand, he declined to take the oath. The judge asked him if he was conscientiously scrupulous of taking an oath. He said that he did not know. The judge then asked him if he belonged to the denomination of quakers, or was opposed to taking an oath in a court of justice, deeming it to be contrary to religion. He frankly admitted that his objection did not arise from a religious scruple, but that he was of opinion it was unnecessary, and that an oath would do no good. The judge then told him he must forthwith take the oath, or he would incur the legal penalty which would arise from his refusal. The witness immediately took the oath, and after being admonished by the judge that he was under the highest sanction, both of religion and law to testify the whole truth, he proceeded, though reluctantly, to give his testimony. He said that about a fortnight before he became entitled to a chance, the defendant told him that he should make a lottery of two hundred numbers, at fifty cents each, and that the prizes would consist of watches and other articles, to the value of one hundred dollars. He was informed, on the 9th instant, that the lottery was to be drawn that evening, at the Warren Hotel, kept by Mr. Glazier. He went to the hotel, and found a crowd of persons assembled for the purpose. They were raffling with dice for chances in the lottery. He paid four-pence half-penny for a raffle, and gained a chance. No tickets were delivered to the adventurers, but their names were contained in a list, which was kept by a person who acted for both parties. The lottery was drawn, but owing to the crowd he did not see who drew it, or in what manner it was drawn. The prizes were publicly announced, and the witness drew a timepiece. The defendant boarded at the hotel, and was in and out at the time. Soon after, he called on the defendant, who kept a small grocery, and received from him an order for the delivery of the timepiece, on one

Kimball, who delivered it to the witness when he presented the order. The defendant mentioned to the witness that he himself had drawn a watch. Who were the owners of the lottery, the witness did not know.

E. Hersey Derby, for the defendant, contended, that penal statutes must be construed strictly, and that, as no ticket was sold and delivered by the defendant to Richard Smith, nor to any one else, the defendant was not liable on this indictment, even if he was the proprietor of the lottery. But he denied that there was proof to authorize the jury to believe that the defendant owned the lottery, or was in any wise concerned in it. If the law was defective, it belonged to the legislature to correct the defect.

Parker, for the commonwealth, insisted that the evidence was sufficient to authorize the jury to infer, that the defendant made the lottery, sold the tickets, and paid the prizes. If he did not sell the tickets himself, it was done by his agent, for whom he was answerable. It was easy for him to produce the person who acted as the common agent both of proprietor and adventurers; for that individual was undoubtedly known to him, though he was not known to the officers of the government.

THACHER, J., instructed the jury substantially as follows:— The act on which the indictment is founded, prescribes a penalty for any person, “who shall sell a ticket, or part of a ticket, in any lottery, which is not authorized by the law of this commonwealth.” The design of the law is, to guard against the mischievous consequences of that species of gaming, which is carried on by lotteries, and which has peculiar attractions to many persons. The law forbids the citizens from making lotteries, and from assisting in their drawing or management; also from selling tickets, or advertising them for sale, either by writing, printing, or any symbolic representations. It is an offence to make a private lottery, great or small, or to sell tickets in any lottery, granted by another state. The whole business, in any form or shape, is unlawful. The law manifests

the desire of the legislature, to guard the morals of the citizens, especially the young and thoughtless, from this species of gambling. What is a lottery? It is a game of hazard, in which money, merchandise, or even land, may be deposited as prizes for the holders of the fortunate numbers, whether their rights are evidenced by tickets, transferable by delivery, or are contained in a book, or on a sheet of paper, kept by some person for the purpose.

I do not deem it material to a lottery, that written tickets or scrip shall be delivered to the purchasers. If they are willing to confide in any one person to keep the evidence of their respective numbers or chances in a book or other memorandum, that is a ticket, and whoever sells a chance to an individual, retaining in his own hand the ticket, or other evidence of the chance, sells a ticket within the meaning and intent of the law. Any other construction would take from the life of the law, and make it the easiest thing in nature to evade it. While capital punishments follow the commission of the slightest violations of the law in England, judges, prosecutors and jurors are astute to resort to any evasion to screen offenders. But with us the law in this case, and in most others, is mild, and good policy requires that such construction should not be given to its provisions as to convert it into a dead letter.

From the testimony of Richard Smith you must in this case make up your verdict. That witness testified that the defendant was present at the disposal of the tickets and at the drawing of the lottery, and that he paid the prizes to the fortunate adventurers. He had before informed the witness that he should make such a lottery. An individual disposed of the chances, and kept a list of the adventurers. If you believe that this person was the defendant's agent, then it was in his power to bring him forward as a witness, or to show why he could not be produced. The agent could, without confessing his own guilt, if he was guilty, exonerate the defendant, if he was not the owner of the lottery, and such agent was not acting for

Commonwealth v. Johnson.

him. If it is in the power of a party to explain circumstances, which bear upon him, and he fails to do so, the jury must act on such evidence as is before them.

The jury found the defendant guilty.

The defendant had also been indicted for being concerned in the management of a lottery, which was understood to be the same lottery as in the above case. After the verdict he retracted his plea, which he had already filed to that indictment, and submitted to the judgment of the court. Upon inquiry, it appeared from the evidence of several witnesses, that the defendant had kept, for some time, a small grocery at the north part of the city, was poor, but had hitherto sustained a fair character for honesty and industry.

He was fined thirty-five dollars, and the costs, which amounted to twenty dollars.

MARCH TERM, 1833.

COMMONWEALTH v. TIMOTHY JOHNSON.

Where it appeared upon the face of an indictment that it was found "by the grand jurors of the commonwealth on their oath," and the county in which it was found, and the names of the jurors appeared upon the record, it was *held* to be sufficient.

In such case the words "on their oath," are equivalent to the words "on their several oaths," and sufficient.

In an indictment for selling lottery tickets in a state where no lotteries are authorized by law, it is not necessary to give the name of the lottery; or to set forth the tenor of the ticket, which never was in the power of the grand jury.

When, under the statute of 1825, c. 18, the indictment charged that the defendant "did unlawfully offer for sale and did unlawfully sell a lottery ticket," it was *held* that this constituted but one offence.

THIS indictment was found at the February term, and con-

tinued on the motion of the defendant to the present term. Upon his arraignment, he filed a demurrer to the same, and assigned five special causes of demurrer, to which the attorney for the commonwealth replied by joining in the same.

A. Peabody declined arguing the demurrer for the defendant, but *S. D. Ward*, who appeared for several other individuals, against whom indictments for the like offence and in similar form were pending at the same time, addressed a short argument to the court, and cited *Com. v. Symonds*, (2 Mass. R. 163 ; Archbold's Crim. Prac. 25, 29 and 62.) *Com. v. Atwood*, (11 Mass. R. 93.)

Parker, for the commonwealth.

The several grounds of demurrer and points made by counsel will appear in the following opinion of the court.

THACHER, J. The first objection assigned against the sufficiency of the indictment is, that it does not appear on the face of it that it was made by the jurors of the county of Suffolk ; and the second is, that it purports to be made on the joint oath of the jurors, and not on their several oaths. The caption to the indictment, which is similar to that which has been in use since the establishment of the court, describes the court, and the term at which it was returned ; and it says, that it was found by "the grand jurors for the commonwealth on their oath." It is matter of record, who the grand jurors are, and who is their foreman, and that they were sworn and qualified according to law. To all of them the same oath was administered, and therefore it is said properly, that the presentment was made on their oath. No indictment is allowed to be filed in court, and to become matter of record, unless it is brought into court by the grand jurors in a body, and delivered to the court by their foreman, by whose signature it is verified. And it appears to the court of record, that the indictment against the defendant in this case, emanated from the grand jurors for the commonwealth for this county. The form of the caption

with the needful variations of the time, place, and style of the court, is substantially like to the precedents of indictments in the English courts, and to those which have been used in the practice of this commonwealth, both before and since the adoption of our constitution. It is similar, in this respect, to the indictment against the soldiers, who were concerned in the massacre of the 5th day of March, 1770, in this town; to that against Jason Fairbanks, for the murder of Eliza Fales, in the county of Norfolk, in the year 1801; to that against Thomas O. Selfridge, for killing Charles Austin, in this county, in the year 1806; and to that against Francis and Joseph Knapp, for the murder of Capt. Joseph White, in the county of Essex, in 1831. In all these cases eminent counsel were concerned, and no exception of this kind was taken to the form of the indictment.

The fourth objection to the sufficiency of the indictment is, that the name of the lottery to which the ticket belonged, is not expressed; and the fifth is, that the tenor of the ticket is not set forth, nor any sufficient reason assigned for its omission. The indictment says, that the ticket "was in a certain lottery not authorized by the laws of this commonwealth, and that it was kept and retained by the said James Johnson, the purchaser, so that the jurors cannot set forth its tenor or substance.

A similar exception was taken in the case of the *Commonwealth v. Hooper*, (5 Pick. R. 42,) and that it was overruled. But it is known to the court, that there is no lottery at this time authorized by any law of this commonwealth; and therefore if a ticket in any lottery was sold, as is alleged in the indictment, the name of the lottery is not material. Under a demurrer, everything which is alleged in the indictment as fact, must be taken to be true, and in this case the jury say, "that the ticket was kept by the purchaser." It does not therefore appear, that the ticket was in the power of the jury; and as the law never insists on anything, which is either impossible or unreasonable, the omission to set forth the tenor or substance of

the ticket, on the part of the jury, is sufficiently accounted for, and cannot be deemed fatal to the validity of the indictment.

If it is true, as is alleged in the third cause of demurrer on which the counsel rely, that this indictment containing but one count, alleges two distinct offences against the defendant, the defect would be material. For though an indictment may contain two or more offences of like degree, requiring like judgments in different counts, yet different offences may not be charged in the same count. And even where, from joining different offences in different counts of the same indictment, it may seem to the court that it will tend to confound the defendant in his defence, the court will, upon motion, require the prosecutor to make his election on which he will proceed to the trial. Regularly, it is most safe to include but one offence in one indictment; but the same act may be charged in different counts as a different offence, to meet the proof, nor will the court in such case require the prosecutor to elect on which he will rely.¹ In the present case, the indictment charges, that the defendant, on the 25th day of January, 1833, did unlawfully offer for sale, and did unlawfully sell to one James Johnson, a lottery ticket in a certain lottery, not authorized by any law of this commonwealth. Is this a charge of more than one offence? The act of 1825, c. 184, says, "if any person shall sell; or offer for sale, or shall advertise for sale, any lottery tickets," &c. Mr. Ward contended, that a man may buy without any previous offer to sell on the part of the seller. And further, that by the words, "offer for sale," the act intends an advertisement or proclamation only, that the party has tickets for sale. He relied with confidence on the case of the *Commonwealth v. Symonds*, (2 Mass. R. 163,) which was an indictment upon the act of 1791, c. 58, for the due observance of the Lord's day. It contained but one count, and charged "that Symonds, on the Lord's day, August 21, 1803, at &c., within

¹ *Thompson's case*, Leach, 568; East, P. C. 515; *Com. v. Jackson*, ante, p. 277.

Commonwealth v. Johnson.

the walls of a public meeting-house there, did behave indecently and rudely, and then and there did wilfully interrupt and disturb the people who were then and there assembled for publicly worshipping God on said day." By the seventh section of the act, it is made an offence, if a person shall, on the Lord's day, within the walls of any house of public worship, behave rudely or indecently. By the eighth section, it is made an offence, and punished by a greater fine, if any person, either on the Lord's day, or at any other time, shall wilfully interrupt or disturb any assembly of people met for the public worship of God, within the place of their assembling or out of it. Two distinct offences, differing in the measure of their punishment, are thus described in this statute. A person may behave rudely and indecently on the Lord's day within the walls of a house of public worship, without disturbing any assembly met for the purpose of religious worship, and even in the absence of such assembly. But if a person shall, on the Lord's day, or at any other time, wilfully interrupt or disturb any assembly, met for public worship, either in a meeting-house, or in a private building, he will incur a higher penalty. It thence follows, that to combine both these acts in one count, as was done in this case, is to charge two distinct offences, and the court cannot know, from reading the indictment, which penalty is to be inflicted. Therefore the judgment was, in that case, properly arrested.

I think that, in an actual sale of a lottery ticket, there is always included the offer to sell. Two minds and two acts are necessary to the completion of the contract ; the one willing to sell, the other to buy, the delivery also, and the acceptance. The description of the offence, in this case, cannot confound the party in his defence. For to express what is necessarily understood as part of an act done, and which must be proved at the trial, cannot be rejected as surplusage, nor deemed immaterial. And, although to offer to sell a ticket, when no ticket is sold, is forbidden, and subjects the party to the penalty,

because the statute intended to abolish the traffic, both root and branch ; yet where the indictment charges that the party offered for sale and did sell a ticket, it is clear to my mind, that one offence only is intended to be described. It would be sufficient, perhaps better, to charge in the words of the act, that the defendant did unlawfully sell a ticket. But as the offer to sell is merged in the sale, I am of the opinion, that but one offence is described in this indictment and but one penalty can follow upon the conviction.

The demurrer was overruled, and the defendant was fined forty dollars, and costs of prosecution.

APRIL TERM, 1833.

COMMONWEALTH v. DANIEL ARLIN.

An indictment for passing counterfeit bank bills, founded upon the fourth section of the statute of 1804, c. 120, (Rev. St. c. 127,) must allege that the defendant had the bill in his possession, " for the purpose of rendering the same current as true, knowing the same to be false, forged, and counterfeit."

The second section of the statute applies only to the bills of the banks of Massachusetts, and those payable at the United States banks therein.

If the tenor of a counterfeit bill is set forth in the indictment, although in the caption it is called a bank bill, it is sufficient under the first section of the act.

THE indictment, in this case, set forth that the defendant, at Boston, &c. on the 29th day of March, 1833, had in his custody and possession a certain counterfeit bank bill, purporting to be a bank bill, payable to the bearer thereof, and to be signed in behalf of the Phoenix Bank, which bank was a corporation established by law, as a bank within the state of Connecticut, of the following purport and tenor. (Here the bill was set forth.)

Commonwealth v. Arlin.

And that he, the said Daniel Arlin, did utter and tender it in payment, with intent one Nathaniel H. Clark to injure and defraud, he the said D. A. well knowing the said bank bill to be counterfeit, against the peace of the commonwealth, and the form of the statute in that case made and provided. The defendant pleaded not guilty, and upon his trial on Monday, the 8th day of April, was found guilty by the verdict of the jury.

Parker, for the commonwealth.

Edward D. Sohler, for the defendant.

A motion was made in arrest of judgment, the grounds of which, and the points made by counsel, will appear in the following opinion.

THACHER, J. The ground of the motion, in arrest of the judgment, in this case, is, that the facts set forth in the indictment, describe no offence, either against any statute of this commonwealth, or at common law. It is not alleged in the indictment, that the defendant had the bill in his possession, "for the purpose of rendering the same current, as true, or with intent to pass the same, knowing the same to be false, forged, and counterfeit." If it was intended to be on the fourth section of the act of 1804, c. 120, the above allegation would be material; because every offence against a statute must be brought within the material words of the statute. It would have been wholly unnecessary, in such case, to allege that the party uttered or tendered the bill to any one for the purpose of fraud; although proof of having so uttered the bill, would be evidence to prove the intent, with which he might have had it in his possession. The fact done, proof of which would bring the case within the act, is alleged, but not the words of the act; and I consider that the description is, for this reason, defective, although it is very evident what offence was intended to be described. It has been contended that this indictment is within the third section of the above act, the language of which makes it an offence, to utter or tender in payment as true, any such

counterfeit bank bill, as is mentioned in the second section of that act. The words of the second section are, "if any person shall falsely counterfeit any bank bill, or promissory note, payable to the bearer thereof, signed in behalf of any company or corporation, by law licensed and authorized as a bank within this commonwealth, or payable or demandable therein, at the office of any banking company, incorporated by any law of the United States." This confines the class of bills to those of the banks of this commonwealth, or to those payable at a branch of the United States Bank, established therein. But the bill in this case, being on a bank established in and under a law of the state of Connecticut, is not within the second section of the act.

The attorney of the commonwealth has argued that this case was within the principle decided in the case of the *Commonwealth v. Carey*, (2 Pick. 47.) The bank bill, in that case, purported to be issued by the Merchants Bank, in Providence, Rhode Island, and it was called in the indictment a promissory note for the payment of money. It was decided by the court, that a bank bill was a promissory note within the meaning of the first section of the act of 1804, c. 120, and that it was not necessary that there should have been, in the indictment, any allegation that the bank was duly incorporated, as the indictment stated a design to defraud an individual. The note in this case is called a counterfeit bank bill, and there is an averment that the bank was duly incorporated. The tenor of the bill being set forth, the name given to it is not material. And although the name of a bank bill is appropriated to that class of promissory notes which is issued by, and on the credit of a banking company; yet if the charge against the defendant in this case, had been for having in his possession this counterfeit promissory note, and for uttering it as a genuine one, the evidence would, on the decision in *Carey's* case, and in that of the *Commonwealth v. Brown*, (8 Mass. R. 59,) have supported the charge.

I think then that the indictment in this case is substantially within the first section of the act of 1804, c. 120. But if there

were any doubt on this point, I cannot doubt that the defendant might be sentenced, as for the offence at common law. Forgery at common law, is, where a person fraudulently writes or publishes a false deed or writing, to the prejudice of the rights of another. It must be published or uttered; the having of such a paper in possession, with the intent only to publish or utter it fraudulently, is not an offence at common law, as was decided in the case of the *Commonwealth v. Morse*, (2 Mass. R. 138.) The court held in that case, that an intention to cheat is not an indictable offence at common law. But the case is clearly within the principle of that of the *Commonwealth v. Boynton*, (2 Mass. R. 77.) The defendant in that case was indicted for uttering and publishing as true, a certain false, forged, and counterfeit bill or note, counterfeited to the likeness and similitude of a bill or note issued by order and direction of the president, directors, and company of the New Hampshire Bank, (which bank then was, and yet is established by, and under the authority of the state of New Hampshire,) signed by the president, and countersigned by the cashier thereof; (setting forth the bill,) against the peace, and contrary to the form of the statute, &c. The jury found the defendant guilty of the offence charged, excepting that the name of the cashier of the said bank, and countersigned to the said note, was not the name of any person who had been, at any time, cashier of the said bank. The indictment was founded on the act of 1800, c. 64, which made it necessary that the forged bank note should purport to be countersigned by a cashier of the bank, whose note is counterfeited. The court decided that this variation in the name of the cashier, took the case out of the statute, but that it was no cause for arresting the judgment, as it was undoubtedly a fraud at common law.

The motion in arrest of the judgment was overruled.

APRIL TERM, 1833.

COMMONWEALTH v. HORATIO PERCIVAL, ALBERT WOODBERRY,
AND CYRUS B. JAMES.

In the trial of an indictment for uttering a counterfeit bank bill, it is competent to show the passing of other counterfeit bills about the same time, although other indictments are pending against the prisoner for those acts.

THE defendants were indicted on the second and third sections of the act of 1804, c. 120, for uttering two counterfeit bank bills, for two dollars each, in the similitude of the bank-bills issued by the Oriental Bank, established in the city of Boston. It contained two counts, and each alleged that it was with the intent to defraud Emanuel Morris. The trial was on the 20th day of April, and the verdict of the jury was, that they were severally guilty. On the same day, Cyrus B. James, was tried and found guilty of uttering a counterfeit bank bill, of the same bank and description, for two dollars, with the intent to defraud James Cooper. On the 14th day of April, the same Cyrus B. James, was tried, and found guilty of uttering one other counterfeit bank bill of the same bank and description, for two dollars, with intent to defraud the same James Cooper. On the 20th day of April, Albert Woodberry was tried, and found guilty of having in possession one counterfeit bank bill of the same bank and description, for two dollars, knowing it to be counterfeit, with the fraudulent intent to utter and pass the same as true and genuine, contrary to the fourth section of the act of 1804, c. 120. The several offences were committed by the three defendants, on the 28th, 29th, and 30th days of March, 1833.

On the 22d day of April, the counsel for the defendants filed a motion for a new trial in these several cases, and assigned as the cause therefor, "that they being indicted for uttering

Commonwealth v. Percival and others.

false, forged and counterfeit bills, in the similitude of the bills issued by the Oriental Bank, knowing the same to be false, forged and counterfeit, and there being some evidence that the defendants did utter certain false, forged and counterfeit bills of said bank, that the court permitted evidence to be given to the jury, that the defendants had uttered similar false, forged and counterfeit bills of the same bank to other persons, and at other times, in order to prove the *scienter*, although indictments were at the time of the trial, pending against said defendants in said court, for the last-mentioned utterings, which evidence was objected to at the time of the trial.

C. P. Curtis, for James, and E. Hersey Derby, for Percival, in arguing the motion, admitted that it was common, in trials of this description, to admit evidence that the party had passed other counterfeit bills, yet this was limited to utterings, before the passing of the bill in question, or to such acts as were connected with it. They contended that it was contrary to principle, and an anomaly in law, to attempt to convict a man of one offence, by proving him to have been guilty of another. It would have no tendency to prove a man guilty of a larceny in one case, to prove that he had committed other larcenies, at other times and places. They principally relied on the case of *Rex v. Smith*, (2 Car. & Payne's R. 633,) where Vaughan, Baron, refused to let a prosecutor give evidence against the prisoner, who was on trial for uttering a one pound bank note, that he had passed other counterfeit bank notes of the same description, because indictments were pending against him for those offences. They did not contend, however, that a subsequent uttering might not be proved against a party on trial, provided it was not the subject of another indictment.

Parker, for the commonwealth, cited *Rex v. Ball*, (1 Camp. N. P. 324); *Rex v. Wylie and another*, (1 N. R. 92); 2 Stark. on Evidence, 377, 378, 581; 7 Dane, 101; *Rex v. Smith*, (4 Car. & Payne, 411.)

THACHER, J. I am to decide, under this motion, whether,

on the trial of a prisoner for uttering a counterfeit bank bill, it is competent to show the passing of other bank bills which were forged, and about the same time, although other indictments were pending against him for such other acts. Because a person has committed one crime, it does not follow that he is guilty of other crimes of the same description; he may be innocent in one instance, but guilty of the other. On a trial for the murder of A., it would not be proper to show that the party had murdered B. and C. at another time and place; such evidence would tend to prejudice the jury against the party, without necessarily tending to prove that he was guilty of the murder of A. and would therefore be rejected, whether other indictments were pending against him for the murder of B. and C. or not. Offences, however, may be so connected, as to make it necessary, on the trial of a party for one of them, to examine the facts of the other. Lord Ellenborough, in giving his opinion in the case of *Sarah Wylie and another*, (1 N. R. 92,) for disposing and putting away a forged bank note, says, "that he remembered a case where a man committed three burglaries in one night; he took a shirt at one place and left it at another; and they were all so connected, that the court went through the history of the three different burglaries." Everything which will tend to elucidate either the guilt or innocence of a prisoner on trial, is pertinent. "Nothing is inadmissible, which is material to the issue, joined to prove or disprove it." Though "no new matter foreign to the issue joined is inadmissible in evidence."¹ What is evidence in any case cannot depend, I think, on the question, whether other indictments are pending against the party for the same, or for other acts connected with it. But care is to be taken that he be not tried twice for the same offence, and that he be not prejudiced by anything which occurs in one trial in reference to another. And therefore each case must be tried by a different jury, "as free, impartial and independent as the lot of humanity will admit."

¹ 2 Bl. R. 1169.

Commonwealth v. Percival and others.

In trials for counterfeiting and uttering counterfeit notes or bank bills, the guilty knowledge by the party of the forgery must be proved. And I take the established rule to be, both here and in England, that the conduct of a prisoner is admissible in evidence for this purpose; and therefore if it can be shown, that the party had in his possession at the time other counterfeit notes or bank bills, or that he put off or uttered to other persons, about the same time, such other notes or bills, it is admissible to prove the *scienter*. Everything that he says or does is proper to be admitted to show his knowledge of the forgery. Nor can I see, that facts tending to prove this knowledge are less essential or less pertinent to the issue, because other indictments are pending against him for those transactions. He may have committed several other crimes of the same character. Why should he not be accused and put on trial for each? They tend to throw light one upon the other. The more he has dealt in false notes and bills, the more likely is he to know their character, and the more dangerous is he to society. In the third section of the act of 1804, c. 120, it is declared, that "if at the same term of the court, any person shall be duly charged and convicted of the said offence, (that is, of uttering false notes or bills) in three several instances, then such person may be adjudged to be a common utterer of counterfeit bills, and shall be punished by solitary imprisonment for a term not exceeding one year, and by confinement afterwards to hard labor for a term not less than two years, and not exceeding ten years." Hence, it is apparent, that the law supposes that those several offences may be committed at about the same time, and in the same country; and the uttering of the bills in various instances, and at and near the same time and place, tends to show the guilty knowledge and the fraudulent intent.

Much reliance has been expressed by the counsel for the prisoners, in their argument, on the case of *Rex v. Smith*, in (2 Car. & Payne's Rep. 633.) That was for uttering a forged one pound note of the Bank of England to Anne Hayward,

knowing the same to be forged. There was a second indictment against the prisoner for uttering another forged one pound note to Emma Hobbs. On the trial of the first, the attorney for the prosecution proposed to give evidence of the other uttering to Emma Hobbs, to prove the *scienter*. But upon an objection being made by the attorney for the prisoner, Vaughan, B. refused to receive the evidence, on the ground, that as the second uttering was made the subject of a distinct prosecution, they were not at liberty to go into the evidence. In England, forgery is punished as a capital offence. How far that circumstance may have influenced the decision of this case, I do not know. The report is extremely brief. The case was at *nisi prius*, and contains no argument of counsel, nor reference to former decisions. It does not appear to me to harmonize in principle with the rules of evidence, which had long before that case been settled by the practice of other eminent judges of English courts. Other utterings before and at the time are evidence, although they may be in themselves substantive offences. For it is a well-founded rule of evidence, that "where crimes intermix, and one is evidence to prove another, the court must go through the whole detail."¹ In the case of the prisoners at the bar, all the bills passed by them were of the denomination of two dollars, upon the Oriental Bank, and of the same manufacture, and were passed within three days. Except in the instance of one bill, which was offered by James, at the Warren Theatre, in payment for a pit ticket, all the defendants were in company at the several times, in which these bills were uttered.

The motion for a new trial was denied, and the prisoners sentenced to the state prison; James for eight years, Woodbury for seven years, and Percival for five years.²

¹ Stark. on Ev. tit. Coin, 378.

² The judgment against James was pursuant to the third section of the act, that he was a common utterer of counterfeit bills.

Commonwealth v. The Mayor and Aldermen of the City of Boston.

MAY TERM, 1833.

COMMONWEALTH v. THE MAYOR AND ALDERMEN OF THE CITY OF BOSTON.

Under the statute of 1833, c. 68, (Rev. St. c. 4, s. 11,) and the twenty-third chapter of the charter of the city of Boston, it is an indictable offence for the mayor and aldermen of the city to omit, through carelessness, to return any votes cast at an election of a member of congress in said city.

Under the statute of 1833, c. 68 and 141, and the twenty-third section of the charter of the city of Boston, the mayor and aldermen of the city may make up their certificate of votes cast at an election of a member of congress in said city, at any time within ten days after the day of the election.

Where the mayor and aldermen of the city of Boston had returned a certificate of the votes cast in said city, at an election of a member of congress, to the governor and council, and before ten days after the day of the election had elapsed, an error in such return was discovered; it was *held*, that, under the city charter, and the statute of 1833, c. 68 and 141, the return might be amended at any time within the ten days.

Where, in the trial of an indictment against the mayor and aldermen of the city of Boston, for neglect in omitting to return certain votes to the governor and council, which were cast in said city, at an election of a member of congress, it appeared, that, after one certificate of the votes had been returned, an error had been discovered therein, and an amended certificate returned which had been rejected by the governor and council, and retained by them unopened; it was *held*, that such rejected certificate was admissible, and should be taken from the secretary of state and opened by the court.

In such case, it was also *held*, that the report of the committee of the governor and council, to whom such amended certificate had been referred, was legal evidence of the existence of the second certificate, and of the time of its delivery and rejection.

CHARLES WELLS, mayor of the city of Boston, and Henry Farnum, John Binney, Samuel Fales, Jabez Ellis, Thomas Wetmore and Benjamin Fiske, aldermen of the same city, were indicted, under the statute of 1833, c. 68, for a neglect in omitting to re-

Commonwealth v. The Mayor and Aldermen of the City of Boston.

turn certain votes cast at the election for a member of congress, held in said city, on the first day of April, A. D. 1833. They severally pleaded not guilty. When the jury was empaneled, each juror was examined on oath, on the motion of the county attorney, whether he had formed or had expressed any opinion on the subject-matter of the indictment; whether he was related to either of the defendants; whether he was conscious of any prejudice or bias in the case; and whether he felt competent to act in it as a free juror.

The county attorney, in opening the case, which was variously described in the three counts of the indictment, stated that it was for a simple act of neglect, without imputing to the defendants anything corruptly done or intended by them. It was for omitting, in their certificate of the votes at the election, which was held in the city of Boston, on Monday, the first day of April, 1833, for a member of congress for the first district, to insert three hundred and thirty-two votes which were given for George Odiorne. It did not appear, in the certificate, that those votes had been given for any one, nor what was the total amount of votes given at the election. The certificate was returned, according to law, to the secretary of the commonwealth. But before ten days had elapsed, within which returns might be made, the omission was discovered. The mayor and aldermen thereupon made out a new certificate in which the error was corrected, and delivered it to the secretary before ten o'clock of the evening of the 11th day of April, which was the last day on which returns could be made. But this second certificate was rejected by the governor and council, and was not opened, because it did not appear, as it ought to have done, that it was made and signed by the defendants within two days after the election.

Samuel F. McCleary, the city clerk, was first called and examined as a witness for the prosecution. He exhibited the book of the mayor and aldermen, in which was contained the abstract of the returns of the votes, given for the various candidates,

Commonwealth v. The Mayor and Aldermen of the City of Boston.

which he had received from the clerks of the several wards. The whole number of votes was three thousand six hundred and eighty, of which three hundred and thirty-two were for George Odiorne. The book, in which he made the entry, was kept for the purpose of recording the result of elections as they occurred; and the abstract of this election was examined by the mayor and aldermen, at a meeting which was holden on that same evening. Owing to a pressure of business in the office at the time, and to an interruption which occurred while he was writing the certificate, the votes for George Odiorne were omitted therein. The certificate was not compared with the examined abstract before it was signed, was immediately sealed up, and was afterwards delivered by the witness to the secretary of the commonwealth. The book in which the abstract was made is considered as a record, and is always open to the public. Edward D. Bangs, the secretary of the commonwealth, was next called. He produced a certified copy of the certificate made by the mayor and aldermen, and deposited in the office of secretary of state on the 3d day of April. The name of George Odiorne, and the votes for him, did not appear in this certificate. The witness delivered this and the certificates from the towns in the other districts of the commonwealth to the governor and council, who met on the 10th day of April, for the purpose of opening and examining the same. Upon his cross-examination, being asked if another certificate had been received by him from the mayor and aldermen, the attorney for the commonwealth objected to the question, which objection was overruled by the court, and thereupon he produced a sealed paper which was delivered to him by S. F. McCleary, on the evening of the 11th day of April. The indorsement on the outside of this envelope, purported to be a return of the votes for the first district from the city of Boston. He delivered it to the governor and council on the morning of the 12th, and by them it was referred to a committee, who reported that it ought not to be opened; which report was accepted by the governor

Commonwealth v. The Mayor and Aldermen of the City of Boston.

and council. It had remained in his custody sealed to that time.

The counsel for the defendants moved that this paper should be opened and read. The attorney for the commonwealth objected to the motion ; and the witness prayed the opinion of the court, if he could, consistently with his duty as secretary of the commonwealth, allow the paper to be opened, inasmuch as it belonged to another department of the government, and was in his official custody.

THACHER, J. Whether this second certificate contained a true and perfect return of all the votes, which were given at the election of the 1st of April, can be ascertained only by inspection. Whether it will avail to any purpose is to be considered afterwards. It may be, that the votes for George Odiorne were omitted in this certificate also, which would preclude further inquiry. Whether there was such second certificate is a material fact in this trial ; and the defendants, as well as the commonwealth, have a right to introduce all facts, which are material and pertinent to the issue. The certificate must therefore be opened. But that the secretary may not be prejudiced, an indorsement shall be made upon it, that it was opened in court, and by the order of the judge, the secretary not consenting thereto. The certificate was then opened by the judge, and an indorsement made on it as ordered.

The attorney for the commonwealth proposed next to read the report of the committee of the governor and council, in which was stated the ground for refusing to open the second certificate. But the counsel for the defendants denied that it was legal and pertinent evidence. The court said, that it was evidence to prove the existence of the second certificate, the time of its delivery to, and its rejection by the governor and council. The reasons assigned in the report for rejecting the certificate, and to show that it was not a valid return, were not binding on this court, further than as they should consist with its own sense of the law. The report was accordingly read.

Commonwealth v. The Mayor and Aldermen of the City of Boston.

The attorney next read a certificate made by the secretary, showing that the mayor and aldermen, from the commencement of the city government, had always met within two days after every election, to examine and compare the votes. This, he said, proved their own construction of the twenty-third section of the charter, which directs the manner in which elections shall be held, and their results be certified. They had met within two days after each election, except in one instance, and examined and compared the votes. But it did not appear, from this paper, when the examination was completed, nor when the certificates were made and signed, none of them having a date. In one instance, the mayor and aldermen did not assemble till the third day after the election; but no exception was made to the return for that cause. The secretary stated that it was, and had been, in times past, the practice of the council to assemble one or two days before the expiration of the time, within which the certificates might be made to the secretary's office. When it was found that the returns from a district were all made, they were assigned to a committee, who proceeded to open and count the votes, and to report the result, as was done in this case. The certificate was exactly similar in form to all which had ever before been received from the mayor and aldermen of Boston. That on the morning of the 11th day of April, the mayor and city clerk went to the governor and council, and requested permission to correct an error in their certificate. But this was refused. In the course of the evening of that same day, the second certificate was delivered to the secretary. S. F. McCleary, being called a second time, stated, that the certificate was pursuant to the form which was adopted in 1822, when the charter went into operation, and which had been followed ever since. Sometimes it had happened that the returns from the ward officers had not been received by the city clerk till the second day after the election, and it would not always be possible within two days after an election, for the mayor and aldermen to complete the examina-

Commonwealth v. The Mayor and Aldermen of the City of Boston.

tion of the returns, and prepare and sign the certificates, which were to be sent to the governor and council. At the election in November, 1832, for state officers, and for electors of president and vice president of the United States, more than five hundred different persons were voted for, and upwards of six thousand votes were cast in this city.

J. Pickering, for all the defendants, and *A. Dunlap*, for Samuel Fales, contended : 1. That the word *neglect*, in the act, meant a total omission of duty, not an incorrect return. 2. That it was competent for the mayor and aldermen to amend their certificate. 3. That an evil intent was essential to the commission of an offence ; but that it was manifest, in this case, that the omission of the name and votes of George Odiorne was accidental and involuntary. (Plowd. 19 ; 4 Bl. Com. c. 2 ; 7 Mass. R. 57.) 4. That the word *thereupon* was equivocal in its signification, and that the mayor and aldermen were not obliged, by the fair meaning of the word in this case, to complete their certificate within two days after the election. 5. If the defendants used reasonable diligence, such as is required in ordinary cases, the jury might properly consider them as innocent of this offence. (2 Chitty C. L. 255.) 6. That the governor and council ought not to have opened and counted the returns till ten days had elapsed from the election ; and that they ought to have opened both certificates, whereby they would have seen at once the true result of the election. *Lincoln v. Hapgood*, (11 Mass. R. 351.)

Parker, for the commonwealth, insisted, that by the true and reasonable construction of the law, the certificates should have been completed within two days after the election, and that it could not be amended afterwards in whole or in part, either by the delivery of a new certificate, or by inserting in the first a fact which had been omitted therein either by design or mistake. He referred to the case of *Coggs v. Barnard*, (2 Ld. Ray. 909,) to show, that one who undertakes gratuitously to perform an act for another, and performs it so negligently as to occasion to him an injury, is liable for the damages.

Commonwealth v. The Mayor and Aldermen of the City of Boston.

THACHER, J., charged the jury as follows.

The mayor and six of the aldermen of this city are on trial before you, for an alleged neglect of duty, in relation to the election for a representative to congress from this district, on the first Monday of April last. It is an instance of the supremacy of the law, that officers, equally respected for their high civil station, and for their personal character, should stand before you at this time, submitting themselves cheerfully to your verdict. It is their turn to-day, it may be yours or mine to-morrow, to exhibit similar respect for the law. In a free state, the rights and duties of the citizens emanate from the law, and are secured by it. Those most eminent for official trust are but its servants; and in yielding to it implicit obedience, consist their highest honor and safety. The law makes it your duty, in this case, to pronounce the verdict; and the judge is but the voice of the law to pronounce its judgment. Stripping the indictment, which is, I think, a model of legal correctness, of all verbal description, the accusation may be stated in a few words. It charges that the defendants, the mayor and aldermen of this city, did neglect to perform the duty of making out a true certificate of the result of the election, which was held in this city on the first Monday of April last, for the choice of a representative to congress from this district, as they were required to do; that in all, three thousand six hundred and eighty ballots were given in at that election, of which three hundred and thirty-two were for George Odiorne, which were duly returned to the city clerk, and by him entered and recorded according to law; but that the defendants omitted, in the certificate which they transmitted to the secretary of the commonwealth, to mention this portion of the votes, and the name of the said George Odiorne. Therefore the indictment concludes that they did neglect to perform the duty of making out a true, perfect, and complete certificate, of the result of the said election, as they were required, and it was their duty to do, by the statute of this commonwealth, in that case provided.

If the truth of this accusation should be established, and the defendants should be unable to invalidate it, the first question which arises will be, whether it constitutes an offence in law. By the seventh section of the act of 1833, c. 68, it is enacted, "that if the mayor, or either of the aldermen or ward officers of the city of Boston, shall neglect to perform any of the duties, which by that act they are required to perform, each officer so neglecting, shall forfeit and pay a sum not exceeding two hundred dollars, nor less than thirty." By the twenty-third section of the city charter, act of 1821, c. 110, "it is made the duty of the mayor and aldermen to meet together within two days after every such election, and examine and compare all the said returns, and thereupon to make out a certificate of the result of such election, to be signed by the mayor and a majority of aldermen, and also by the city clerk," which was according to the act of 1833, c. 60, to be transmitted to the secretary of the commonwealth, within ten days after the day of said election.

The mayor and aldermen are not charged with anything corrupt. No one imputes to them a dishonorable purpose. In what is imputed to them, there was no chance to gain to themselves any advantage, or to do to others a personal injury. No choice had been made of either of the candidates; nor were the governor and council misled by the certificate, to declare that one had been chosen. It is simply an act of negligence which happened to the defendants in the performance of their official duty; such an act as might happen in the life of any public officer, without any intention in him to offend. But so highly and with so much justice is the elective principle regarded in our free commonwealth, that to secure the highest vigilance of public officers, they are subjected by law to a pecuniary penalty, for a simple act of neglect, that is, as the word is understood in its common intent, for an "omission by carelessness" in the performance of their duties on such occasions. If a party on trial for such alleged violation of the law, has a good excuse to offer for his neglect, it will be for the jury to judge of

Commonwealth v. The Mayor and Aldermen of the City of Boston.

its validity. Suppose that the mayor or a majority of the aldermen should be incapacitated by sickness from making the examination and return; suppose that the fault should arise from the neglect of the ward officers, in not returning transcripts of the record of votes in the several wards, in which case the ward officers would be answerable; or from the fault of the citizens in totally neglecting the election, if such supposition were decent and credible,—these facts might be shown to the jury, in a trial, to excuse the mayor and aldermen, and to extenuate their fault, in not making any return of the result of an election.

There are certain laws of our commonwealth, which, by way of distinction, are called political laws. Such are the provisions of the constitution, for regulating the organization, the form, and the powers of the several branches of the government; such are also the laws which prescribe the rights and duties of the citizens in the exercise of their elective franchise, and which require from public officers, on such occasions, the utmost impartiality, fidelity, and diligence. On the purity of elections, and the faithful observance of the laws which regulate them, depends the continuance of our republican institutions. It is not therefore material to inquire from what motive this prosecution originated. It may be from that division of parties which exists among us, and which are the natural fruit of a free community. As interest or a sense of right and duty or even caprice may prevail, the citizens divide themselves into parties, each striving to acquire or to keep the ascendancy, each watching the others, and ready to take advantage of their faults. It is useless to complain of this state of things; it is our political condition, and perhaps it is not much to be regretted, as it imposes on public officers the necessity of constant watchfulness, and promotes, in that way, more good than evil to the commonwealth. The grand jury have very properly presented this case for legal animadversion. The act complained of is not a wrong to a particular class of voters, but to the whole

Commonwealth v. The Mayor and Aldermen of the City of Boston.

body. What occurred to the friends of Mr. Odiorne, may happen to those of some other candidate at the next election, and the common good requires a strict observance of the law without respect of persons. I am of the opinion, that if you come to the conclusion that the defendants did neglect, in their certificate, to return the votes for George Odiorne, as charged in the indictment, it was an offence, and that it will be your duty to find them guilty, unless they satisfy you that the omission did not proceed from carelessness, and that it could not have been prevented, on their part, by ordinary care.¹

The facts in this case, on the part of the prosecution, are briefly these. Elections were held in the several wards of this city for a member of congress, on the first Monday of April last. Records of all the votes given, after they had been collected, sorted, counted and declared, by the inspectors of elections in each ward, were made by the several clerks; and transcripts of the same, certified by the warden, clerk, and a majority of the inspectors of each ward, were forthwith transmitted to the city clerk. This officer forthwith entered the returns, and made a plain and intelligible abstract of them, as they were successively received, in a book, which was kept by the mayor and aldermen for that purpose. It appeared, by this abstract that three hundred and thirty-two votes had been given for George Odiorne. The mayor and aldermen met, within two days after the election, examined and compared all the returns, and thereupon made out a certificate of the result, which was signed by the mayor and a majority of the aldermen, and by the city clerk, sealed and transmitted, within ten days after the election, to the secretary of the commonwealth. In this cer-

¹ This opinion arises from the language of the statute; it being competent for the legislature to punish an act of neglect merely, in a matter of great political importance, even though it should not have been done maliciously or wilfully. To do an act wilfully, "is to act contrary to a man's own conviction." *Drewe v. Coulton*, (1 East R. 563, note a.) See also the case of *Lang* and that of *Aglar and another*, post.

Commonwealth v. The Mayor and Aldermen of the City of Boston.

tificate, so made and signed by the defendants, in their official capacity, no mention was made of the votes for George Odiorne, nor did his name appear.

But the defendants say, on their part, that although it is true that they did transmit to the secretary such a certificate, and that the name and votes for George Odiorne, were, by mistake, not contained in it; yet that within ten days after the election, they, upon learning the omission, made application at the council chamber for permission to amend the return, which request was denied. In the evening of the same day, a new certificate signed by the mayor, by a majority of the aldermen, and by the city clerk, was transmitted to the secretary, containing the true result of the election, and in which the votes for George Odiorne, were set forth at length. This certificate was delivered by the secretary to the governor and council on the next morning, and was by them, after consideration, rejected, and remained sealed until it was opened by this court. The facts relied upon by both parties have been proved, and are not contested. Hence it is apparent, that it could not have been the intention of the mayor and aldermen to suppress the votes for Mr. Odiorne. From their readiness and anxiety to amend their first certificate, and from their subsequent tender of a second certificate, within the terms limited by law for making returns, it is fair to presume, that the omission of those votes in their first certificate was accidental and undesigned.

The attorney for the commonwealth contends, that the defendants were bound by their first certificate; that after the second day had elapsed, it could not be amended; that when once it had been transmitted to the secretary and was in his custody, it could not be withdrawn, nor could the governor and council allow it to be amended, or accept another in its place. But the counsel for the defendants insist, that they were not limited by law to make their certificate on the second day after the election; that the mayor and aldermen, having met within two days, and examined and compared the returns from the

Commonwealth v. The Mayor and Aldermen of the City of Boston.

wards, might prepare the certificate afterwards, at any time within ten days, in which it must be delivered to the secretary ; that if an error or omission existed in that first certificate, they might correct it afterwards ; and that they having, in fact, made a true and perfect certificate, and transmitted the same to the secretary, had conformed to the letter and spirit of the law. And further, that it was competent for the governor and council to receive such second certificate, and to act upon it as a true return of the votes from this district. You perceive, then, that this is a question of law, arising under the statute, and it becomes necessary to recur to its words to learn its true meaning. To do this successfully, we must abstract ourselves from all sources of prejudice, and view the law without reference to what has been done or omitted, either by the mayor and aldermen, or by the governor and council.

The third section of the act of 1833, c. 68, directs that the election in the city of Boston shall be held, "and all the proceedings thereon had, and the returns thereof made, in conformity with the directions of the act establishing the city of Boston." These directions are contained in the twenty-third section of the city charter, and apply to "all elections for governor, lieutenant governor, senators, representatives, representatives to congress, and all other officers who are to be chosen and voted for by the people." The law prescribes the several things which are to be done, and by whom they shall be done, with the manner and order of time, in which they shall be done. It supposes that they are to be done successively, and not all at once, which would create inexplicable confusion, and lead to innumerable mistakes. 1. The votes in each ward are first "to be collected, sorted, counted, and declared, by the inspectors of elections." 2. The clerk of the ward is next "to make a true record of the same, specifying therein the whole number of ballots given in, the name of each person voted for, and the number of votes for each, expressed in words at length." 3. "A transcript of such record, certified by the warden, clerk

Commonwealth v. The Mayor and Aldermen of the City of Boston.

which he had, received from the clerks of the several wards. The whole number of votes was three thousand six hundred and eighty, of which three hundred and thirty-two were for George Odiorne. The book, in which he made the entry, was kept for the purpose of recording the result of elections as they occurred; and the abstract of this election was examined by the mayor and aldermen, at a meeting which was holden on that same evening. Owing to a pressure of business in the office at the time, and to an interruption which occurred while he was writing the certificate, the votes for George Odiorne were omitted therein. The certificate was not compared with the examined abstract before it was signed, was immediately sealed up, and was afterwards delivered by the witness to the secretary of the commonwealth. The book in which the abstract was made is considered as a record, and is always open to the public. Edward D. Bangs, the secretary of the commonwealth, was next called. He produced a certified copy of the certificate made by the mayor and aldermen, and deposited in the office of secretary of state on the 3d day of April. The name of George Odiorne, and the votes for him, did not appear in this certificate. The witness delivered this and the certificates from the towns in the other districts of the commonwealth to the governor and council, who met on the 10th day of April, for the purpose of opening and examining the same. Upon his cross-examination, being asked if another certificate had been received by him from the mayor and aldermen, the attorney for the commonwealth objected to the question, which objection was overruled by the court, and thereupon he produced a sealed paper which was delivered to him by S. F. McCleary, on the evening of the 11th day of April. The indorsement on the outside of this envelope, purported to be a return of the votes for the first district from the city of Boston. He delivered it to the governor and council on the morning of the 12th, and by them it was referred to a committee, who reported that it ought not to be opened; which report was accepted by the governor

Commonwealth v. The Mayor and Aldermen of the City of Boston.

and council. It had remained in his custody sealed to that time.

The counsel for the defendants moved that this paper should be opened and read. The attorney for the commonwealth objected to the motion ; and the witness prayed the opinion of the court, if he could, consistently with his duty as secretary of the commonwealth, allow the paper to be opened, inasmuch as it belonged to another department of the government, and was in his official custody.

THACHER, J. Whether this second certificate contained a true and perfect return of all the votes, which were given at the election of the 1st of April, can be ascertained only by inspection. Whether it will avail to any purpose is to be considered afterwards. It may be, that the votes for George Odiorne were omitted in this certificate also, which would preclude further inquiry. Whether there was such second certificate is a material fact in this trial ; and the defendants, as well as the commonwealth, have a right to introduce all facts, which are material and pertinent to the issue. The certificate must therefore be opened. But that the secretary may not be prejudiced, an indorsement shall be made upon it, that it was opened in court, and by the order of the judge, the secretary not consenting thereto. The certificate was then opened by the judge, and an indorsement made on it as ordered.

The attorney for the commonwealth proposed next to read the report of the committee of the governor and council, in which was stated the ground for refusing to open the second certificate. But the counsel for the defendants denied that it was legal and pertinent evidence. The court said, that it was evidence to prove the existence of the second certificate, the time of its delivery to, and its rejection by the governor and council. The reasons assigned in the report for rejecting the certificate, and to show that it was not a valid return, were not binding on this court, further than as they should consist with its own sense of the law. The report was accordingly read.

Commonwealth v. The Mayor and Aldermen of the City of Boston.

the mayor and aldermen should not only examine and compare the votes, but also make out, sign and seal up the certificate of the result within the two days ; in which case, there would be no room to alter the certificate, or to correct an error in it, at any time afterwards. But if the legislature did not mean to confine the signification of this word *thereupon* to the time when the certificate should be made, but intended that the certificate should be made *upon* such examination and comparison, and should contain the true result, leaving it uncertain at what time it should be made ; then it would not be material, whether the certificate were made at that meeting within two days, or at any time afterwards, provided it had been made, signed and transmitted to the secretary within ten days after the election. The word "thereupon," sometimes means "upon that," or "in consequence of that," and sometimes "immediately." The attorney for the commonwealth contends, that it means in this place, "then and there." Now, "when words are used equivocally," says Dr. Johnson, "I receive them in either sense." Where the meaning of the law is clear, it must be followed to the letter ; but when that is obscure, the court must follow its own understanding. The meaning of a word in any instance must depend on the manner in which it is used. If the legislature had intended, that the word should in this case refer to time only, and should be equivalent to the word "forthwith," which always signifies immediately, meaning that the examination and comparison of the votes, and the making out and completion of the certificate should be a continuous act, to be done immediately and to admit of no delay ; why did they use a word which is equivocal, instead of the word "forthwith," which had occurred twice before in the same section ? Why did they not use a similar phraseology to that in which they require the selectmen of towns, in the like case, "to seal up the lists and certify the same in open town meeting ?" If the same idea was intended, why, in a case where precision is most necessary, should there be a change in the phraseology ? "The

Commonwealth v. The Mayor and Aldermen of the City of Boston.

different penning of two clauses in one and the same act, convinceth me," says Sir Michael Foster, "that the legislature had in contemplation two different objects, distinct in their nature and tendency."¹

Where the legislature, in requiring an act to be done, use an equivocal expression, such signification is to be applied to it, as is most safe and convenient in practice. In framing this provision, which was to regulate all elections in this city, the legislature were aware that it would be impossible, in some instances, for the ward officers and the city clerk to perform all the duties enjoined upon them respectively, and for the mayor and aldermen to examine all the returns, and make out, sign and seal several certificates containing a true result of the election, within the space of two days. It is therefore my opinion, that the signification of the word "*thereupon*" is not to be restricted, in this place, to express the time when the mayor and aldermen should complete their certificate, but that it intends that the same should be made *upon* the examination and comparison of the returns from the wards and the abstract of the city clerk, and that it should contain the true result of the election. If this construction of the law is correct, it follows that it is not material whether the certificate be completed in two days after the election, or afterwards, provided that it be made out, signed and transmitted to the secretary within ten days after that event. If this is a just construction of the act, it secures to the city the deliberate performance by their officers of the duties which belong to them respectively in conducting elections, and to the mayor and aldermen in particular, ample time for their examination and comparison, and to make out certificates of the result, when they are necessary.

After the examination and comparison by the mayor and aldermen in the present instance, they made and signed a certificate of the result, which was sent to the secretary, in which

¹ Foster's C. L. Dis. I. c. III. s. 8.

Commonwealth v. The Mayor and Aldermen of the City of Boston.

certificate the votes for George Odiorne were omitted by mistake. From the view which I have taken of the law, this omission was such a neglect as subjected these defendants to the legal penalty, unless it was competent for them to amend their certificate, or to make and transmit a new one to the secretary within the time prescribed by law. Hence arises the next question in this case, for your consideration, whether such error might be corrected. If the answer to this question depended on the analogy to proceedings in courts of justice, it would be at once answered in the affirmative. For now, where justice requires it, "courts will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past. For they at present consider the proceeding as *in fieri*, till judgment is given; and therefore, that till then they have power to permit amendments by the common law; but when judgment is once given and enrolled, no amendment is permitted in any subsequent term. Mistakes are also effectually helped by the statutes of amendment and *jeofails*, so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error, he is at liberty by those statutes to amend it."¹ Amendments are, therefore, allowed in judicial proceedings, to avoid delay and expense, for the ease of the citizens, and for the sake of truth and right.

When a sealed certificate, containing the result of an election, has been delivered to the secretary, he must keep it till it be delivered by him to the governor and council, by whom it is to be opened and examined. He cannot, I think, consistently with his duty, return it to the party who made it, or allow it to be opened, or permit any erasure or addition to be made therein, as we correct a writ or other judicial process. After ten days have elapsed, the mayor and aldermen of the city would certainly be bound by their certificate, and it could not be altered or amended in any respect. If, however, the mayor and alder-

¹ 3 Bl. Com. 407.

men should discover that they had transmitted to the secretary a wrong paper, or an imperfect certificate, not containing the true result of the election, whether by their own error, or by the fraudulent act of any other person, it would be their right, I think, and their duty, if the ten days had not elapsed, to make out and transmit to the secretary a second certificate, which should contain a perfect account of the result of the election. It would be the right, and, I think, the duty of the governor and council to open this paper, as well as the first, and to decide upon both according to their wisdom. Nor can this right and duty be in any wise affected by the fact, that the first certificate had been already opened, examined, and acted upon by the governor and council prior to the expiration of the time, within which returns might be made to the secretary. For though public convenience may require, that the governor and council should meet prior to the lapse of the time within which returns may be made, and they may proceed to open and count the returns which have been received by the secretary ; yet no rule of convenience can take from this city, nor from any town in the commonwealth, any portion of the full period which is allowed by law, in which returns may be made. And, therefore, such previous counting must be subject to correction or addition, as further returns shall be received. No usage in similar cases, however sanctioned by length of time, and even by the practice and example of the most eminent men, can avail against positive law. "Regularly," says Lord Coke, "a man cannot prescribe or allege a custom against a statute, because that is matter of record, and is the highest proof and matter of record in law."¹ I think, therefore, that I am warranted in this position by the settled principles of law ; although I would express it with the utmost deference and respect for that department of the government, which is particularly bound to watch over and guard against errors and faults in all other

¹ Co. Lit. 115.

branches of the government, and by all inferior officers of the state.

Evils of so serious a nature may arise from a certificate, not containing the true result of an election, or containing matter not true, that convenience requires, I think, if on any fair construction of the language of the law an error may be corrected, before it is barred by time, that it should be corrected. Suppose that it had appeared, from the first certificate in this case, that one of the candidates had received a majority of the votes; the governor and council would have been obliged to certify that fact, and to issue to the individual a credential, which would have entitled him to take a seat in congress. And yet the house of representatives of the United States would have right to inquire into the facts of the case, by a recurrence to the records of the several wards, and to the examined abstract of the city clerk, and would vacate his seat, because no one of the candidates had a majority of the votes, and no choice had been made. Suppose that one of the candidates had been elected, but owing to a mistake in the certificate, it should appear that no choice had been effected; the governor and council would be obliged, by the certificate, to declare that result, and to issue a precept for a new election, to which the citizens would be compelled to submit. But the house of representatives, being final judges of the election and qualification of their members, and of all who claim to be so, would have the right, and it would be their duty, to go behind the certificate of the governor and council, and, by a reference to the records of the several wards, to decide if any one had been elected, according to the fact. For the right to a seat in congress, depending on the choice of the people, is not to be defeated by the mistake of any of their servants. It seems to me, therefore, that every rule of convenience requires, that the mayor and aldermen should be allowed to avail themselves, even of the last moment of the limited period, to put into the hands of the secretary the true result of the election. When two

Commonwealth v. The Mayor and Aldermen of the City of Boston.

returns are before the governor and council, containing different results of the same election, both signed by the same officers, both purporting to be true, and both returned in due season, I admit that both must be rejected for the uncertainty. But where the second certificate purports to correct an error in the first, and to contain the true result, I confess I see no difficulty.

To inflict a penalty on public officers for an accidental mistake, when no wrong was intended, and none done, especially when they corrected the error, and put it into the power of the governor and council to know the true result of the election, would, it appears to me, be against those humane principles of equity which should guide courts in the administration of the criminal justice. To exact the letter of the bond in such case, would, in my judgment, be against all good policy. For what citizen, who values his own happiness, will consent to serve in offices of more labor than profit; if fair intention will not protect him from judicial stigma and forfeiture in the performance of his public trust. If, therefore, in the view which you shall take of the facts in this case, when you retire to deliberate upon them, you believe that the defendants transmitted to the secretary of this commonwealth, within ten days after the election of the first Monday of April last, a certificate signed by the mayor and a majority of the aldermen, and by the city clerk, made upon the examination and comparison by them, at a meeting held within two days after that election, which contained the true result, and in which the votes for George Odiorne were set forth at full length; then it will be your duty, in law, to return a verdict in their favor. But if you are not satisfied in point of fact, that the certificate so transmitted by the defendants to the secretary, did contain the true result of that election, and if you believe that the certificate did not contain the name of George Odiorne and the number of votes given for him, then it will be your duty, in law, to find them guilty.

The jury returned a verdict of acquittal.

JULY TERM, 1833.

COMMONWEALTH v. WILLIAM J. SNELLING.

Where the matter set forth in an indictment for a newspaper libel does not amount to a libel, the defect cannot be supplied by other parts of the libellous publication.

In the trial of an indictment for a newspaper libel, a conversation between the person libelled and the defendant, which gave rise to the libellous publication, printed in the same newspaper with the publication, and to which the publication referred, was allowed to be read by the counsel for the government, in opening the case.

Where, under the act of 1826, c. 107, (Rev. St. c. 133, s. 6,) which allows the truth to be given in evidence, in the trial of indictments for libel, the defendant, by order of the court, furnished a specification of the facts intended to be proved under the act, evidence of facts not specified was held to be inadmissible.

Upon the trial of an indictment for a newspaper libel, charging a justice of a court with official misconduct, letters addressed to him by his associate justices, offered in evidence to show their opinions in regard to the administration of justice, in certain cases, in such court, were *held* to be inadmissible.

Upon the trial of an indictment for a libel, which charges only official misconduct, no evidence of private misconduct can be introduced.

THE defendant was indicted for a libel, published by him, against Benjamin Whitman, the senior justice of the police court of the city of Boston, in the New England Galaxy of May 11th, 1833. The matter complained of as libellous, was as follows: "We accuse him of disgracing his office, of perverting the law, which, bad as it is, is yet worse in such hands, of doing injustice on his seat, of descending from his official dignity, of suffering his personal feeling to interfere with the discharge of his functions." — "We do not pretend that we have related all of the above conversation with minute accuracy, or that we may not have forgotten some trivial circumstances; but that it is correct in substance, we pledge our sacred honor, and would

pledge our life, if it could be pledged. If we do not prove the same in a court of law, let us suffer the extremity of the statute, and be ever after held up to public scorn as a monster. Let Judge Whitman choke a week or so on this pill, and we have one or two more as hard to swallow, in reserve. These, bitter as they are, are not the words of passion, but the deliberate expression of our conviction, respecting the duty we owe to ourself and our country. We think we shall do service to God and man, by removing this unjust magistrate from the seat he disgraces."

In the libellous paper, reference was made to a certain conversation, which took place between the defendant and Justice Whitman, at the time that the matter occurred in the police court, which gave rise to the publication. It was contained in the same newspaper in which the libel appeared. The objection made by the defendant's counsel to the reading of this conversation to the jury, was overruled, and it was read. But when the county attorney was about to read the whole of the publication, or rather that part of the publication which was not set forth in the indictment, to the reading of which the defendant's counsel objected, the court said that it was undoubtedly the right of the defendant to read the whole piece; but if the matter charged in the indictment was not a libel, the defect could not be supplied by other parts of the publication. And therefore the piece was not read. Before, however, the defence was concluded, the whole was read by the defendant's counsel to the jury, and was commented on in the argument. The defendant admitted himself to be the editor of the newspaper, and author of the publication complained of. The defendant undertook, in his defence, to justify the publication, by showing a series of facts in relation to the official misconduct of Justice Whitman, by virtue of the act of 1826, c. 107, which allows the truth to be given in evidence. Upon the motion of the attorney for the commonwealth, the court required the defendant's counsel to specify the several facts and cases, the truth of

Commonwealth v. Snelling.

which he meant to give in evidence, in proving the truth of his publication. This was ordered on the second day of the trial. After objection by the counsel for the defendant, he specified the cases in pursuance of the order, and was not permitted afterwards to introduce evidence of other instances of alleged official misconduct. Much evidence was introduced, which established the fact that Whitman had, in certain cases, directed the forms of complaint before the police court, so that the jurisdiction of that court might be final, when the offences were beyond that jurisdiction. The court refused to allow the defendant to prove what had been done in the common council of the city, in relation to withholding the salary of Whitman, or to its reduction, in order to compel him to resign his office. And also would not permit the introduction of testimony to prove that Mr. Whitman was habitually intemperate in the use of ardent spirits, because the libel charged only official misconduct. But the court gave the defendant liberty to prove that the justice had been intoxicated in any instance, while he was sitting in court, as a magistrate; but this was not pretended to have been the fact. The defendant's counsel offered to read sundry letters, which passed between Justice Whitman and William Simmons, and John G. Rogers, his associates in the police court, in order to show their respective opinions, in relation to the manner in which justice should be administered in particular cases in that court. But the court decided that the letters of Whitman might be read to contradict any statement which he had made as a witness; but that the letters of Simmons and Rogers were not evidence; since they amounted to their opinions only, and as Whitman was entitled to his opinion as well as his colleagues in office to theirs.

THACHER, J. During the unusual length of time which this trial has occupied, I have studied to acquire a just knowledge of the case, so that I might assist you with my advice, in coming to a correct result. I shall little regard the labor of the trial, or the time consumed in it,

if your verdict should be consistent with law, and happily promote the peace of our society. The defendant is on trial, charged with the publication of a malicious libel upon Benjamin Whitman, in his office, as senior justice of the police court and of the justices court of this city. Almost everything which is odious in the character of a judge, seems to be contained in the publication upon which this indictment is founded. It supposes him to be void of all judicial dignity, arbitrary, unjust, partial, and even corrupt ; although the last epithet is not directly applied, but is left rather to be inferred in the mind of the reader. But in the course of the defence, the counsel for the defendant have disavowed all intention to impute corruption. It is made with deliberation, "after two days and nights deliberation, and with great solemnity," for he "pledges his sacred honor, and his life, so far as it may be pledged, to prove the accusation in a court of justice." If it is a libel to publish maliciously of another, in printing or writing, what is designed to blacken his reputation, and to expose him to public hatred, contempt and ridicule, or if, in the language of Alexander Hamilton, a libel is "a censorious or ridiculing writing, picture or sign, made with a mischievous or malicious intent against government, magistracy or individuals," it is for you to judge, whether the present publication is, or is not of that character.

Mr. Whitman, now far advanced in life, has arrived at a period, when his good name is of greater value to him, and to his children, than any earthly human possession. For the last ten years he has held a commission from the supreme executive of this commonwealth, which was of great trust, and earned by a long life of professional labor. It was conferred upon him on account of his presumed learning, ability, integrity, and qualifications for the judicial office ; and it has placed him in a situation, which called for a firm mind and a benevolent heart ; for fidelity to the public, and, at the same time, for that fearless independence in the discharge of duty which will dare to interpose a shield between innocence and a host of accusers. To

Commonwealth v. Snelling.

publish of a man, in such an office, that he disgraces that office, that he is arbitrary, unjust, partial and corrupt, cannot but be a malicious libel, according to the laws of this commonwealth, unless the truth of the accusation can be fairly made out, and the publication can be shown to have been made with good motives and for a justifiable end. And, therefore, the government having proved that the defendant published this libel, claims your verdict against him, that reparation may be made to the public and to the wounded feelings of the magistrate for so great an injury, and so evil an example to others in like manner to offend. But the defendant, on his part, far from acknowledging that he is a foul calumniator, and deserving of punishment, claims by this publication to have done a meritorious deed. He is a young man of learning and talents, and is animated by a zeal which certainly qualifies him for great good or great evil. He possesses talent; no one can read his composition without wishing that his pen might always be employed in the cause of learning and virtue. He rests his defence in this case on proving the truth of the matter contained in the publication complained of.

Formerly, it was the law of this commonwealth, that the truth of the matter contained in a publication charged as libellous, could not be given in evidence. If the publication was malicious, and had, upon its face, the tendency to expose a man to the scorn and contempt of his fellow-citizens; the law, in its solicitude to preserve the peace of society, would not stop to examine whether the matter was true or false, but considering the act as tending to provoke the party injured and his friends and family to acts of revenge, which it would not be easy to restrain, therefore punished it severely. The essence of the offence consists in the malice of the publication, or the intent to defame the reputation of another. Society owes this justice to its members, to resent injuries to them as done to itself, for the sake of the general peace. Before any legislative act on this subject, the rule which excluded the evidence

of the truth of the libellous matter was relaxed ; so that where a party having proved that the publication was for a justifiable purpose, he was allowed to give in evidence the truth of the words, when such evidence would tend to negative the malice and intent to defame. A man might complain to the legislature to obtain the removal of an unworthy officer, and would be permitted to prove the truth of his allegations in support of the complaint. A candidate for public office was considered to put his character in issue, so far as respected his fitness and qualifications for the office ; and, therefore, publications on the subject, with the honest intention to inform the people, were not deemed libellous. And so every man holding a public elective office was considered as within the principle. These modifications of the common law grew out of our republican institutions ; and are recognized by our supreme judicial court in the case of *William Clapp*, (4 Mass. R. 163.) In the year 1826, the legislature of this commonwealth passed a law " that in every prosecution for writing and publishing any libel, it should be lawful for any defendant upon trial of the cause to give evidence in his defence, the truth of the matter contained in the publication charged as libellous." But aware what liberty this would give to malice — that the faults and follies of a man's youth, or of former years, might be called up long after they were not only forgotten by mankind generally, but atoned for by a series of virtues and services to the public ; — that the sanctuary of domestic life might be invaded by publishing the faults of a child or other near relative, and only to gratify a refined malice ; the law goes on to provide, " that such evidence of the truth of the matter shall not be a justification, unless on the trial it shall be further made satisfactorily to appear, that the matter charged as libellous was published with good motives and for justifiable ends." If, therefore, when you retire to review this case, you should believe that the defendant has proved the truth of the matter complained of, still if you should be of opinion that the public had no interest in the pub-

Commonwealth v. Snelling.

lication, and that the defendant was not actuated by good motives or for a justifiable end, but solely to gratify an evil and malicious disposition, and to wound the peace and injure the good name of Mr. Whitman, you will be bound to find him guilty.

The law confines the evidence to the matter contained in the publication. Under the allegation of official misconduct, the party would not be permitted to prove private immorality, or domestic turpitude. These would render the man odious, but it would not follow, that he had committed a misdemeanor in office. Because the private life of the judge was defective in any respect, it would not follow, that he had not meted out the most exact justice between suitors, while he was sitting in a court of justice. The law gives to the libeller an ample range. He may strike whom, and when, and where he pleases. But where he strikes, there he must abide; and if he strikes wrong he must take the consequences. The most virtuous citizen, the most pure and exemplary magistrate or public officer, may suddenly and unexpectedly, and perhaps, undeservedly too, be attacked in the public press, and put, in fact, on trial for any charge which may be engendered by a private foe, or an interested partisan, or by one desirous of his ruin, no complaint having been first made to a magistrate, or to the grand jury. If such an individual had committed a public or private wrong, or were suspected to have done so; why, if the accuser seeks only justice, does he not seek for it in its courts, or at its altar? If the magistrate abuses his trust, is perverse, ignorant, self-willed, partial, or corrupt, why not complain at once to the only power which, while it can investigate the truth of the complaint, can also apply the remedy? Hence it is most reasonable, that in conducting his defence, the party should be limited in his proof to the subject-matter of the publication. The party libelled is subjected to a great disadvantage. If he were indicted for any oppressive or illegal act in the course of his official conduct, his offence would be described with legal

exactness. So, if he were accused before the senate of high crimes and misdemeanors, every act complained of, with all circumstances of time and place, would be detailed on the record. But, in the present case, it was in the power of the defendant to select from the records of a long judicial life, any charge, and to compel Mr. Whitman to answer it. Which of these parties is entitled, under these circumstances, to favor; the individual, who has volunteered to put down the magistrate, or the man, who has been involuntarily placed before the public under circumstances so unexpected and trying?

The defendant rests his defence on proving that Judge Whitman has committed various high crimes and misdemeanors in his office. The justices of the police court have a difficult task to perform. Complaints are made, in the first instance, to the sitting magistrate. The offender, or person accused, is first brought before him. The accuser and the accused are generally, at this stage, under a high state of excitement; the former for the injury which he may have sustained, the latter from passion, from excess, and from guilt; sometimes he is ignorant of the accusation and of his legal rights, he is without counsel, and unprepared even for the primary examination. All is in commotion around the magistrate—all ought to be, if possible, calm and serene within. He is bound to shield the innocent, and to protect the injured, as well as to punish the guilty, or to cause him to be placed, where the law will have its course. If the magistrate, in such situation commit an error, he is certainly entitled to favorable constructions. "And therefore," says the law, "if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office."

Again, "If a magistrate abuses the authority reposed in him by the law, in order to gratify his malice, or promote his private interest or ambition, he may be punished also criminally by indictment or information. But the court of King's Bench have

Commonwealth v. Snelling.

frequently declared, that though a justice should act illegally, yet if he has acted honestly and candidly, without any bad view or ill intention whatsoever, the court will never punish him by the extraordinary mode of an information, but will leave the party complaining to the ordinary method of prosecution by action or indictment. Indeed, where a justice has committed an involuntary error, without any corrupt motive or intention, it may be questioned whether it is an indictable offence.”¹

It will be but fair for you to inquire, whether the acts imputed to Judge Whitman are such, that if he were now on trial for them, on an indictment, he would deserve conviction ; or if charged before the senate of this commonwealth for the same, he ought to be found guilty and removed from his office. If he is an unjust judge, and perverts his office to the purposes of injustice, he would deserve such fate, and the truth of such an accusation would, I think, be sufficient justification for the publication. But if the facts on which the defendant relies, fail to satisfy you that Mr. Whitman is an unjust judge, and a perverter of the law, then you will be bound to consider that he has failed in his defence, and it will be your duty to pronounce him guilty. The burden is on the defendant, to prove the actual guilt of Judge Whitman. He professes, “that he has declared war against the judge, not against the man. His appeal is now to the people.” He declares, “he will next complain to the grand jury, and then to the general assembly.” He promises “to hunt him through all the windings of the law.” In language striking and terrific, he warns the object of his invective, that “the bloodhound is unchained that will never quit the slot till he is gorged.” Language like this is happily very rare in our community. No one can say that the defendant has not voluntarily assumed the office of denunciation ; and the duty devolves on you, as sworn to do justice, to require from him the full and satisfactory redemption of his pledge.

¹ 1 Black. C. 354.

The refusal of the justice to grant a warrant to arrest an individual against whom the defendant made a complaint, until he had further evidence, or had heard the testimony of certain individuals who were present at the time, provoked the defendant to publish this piece. Now, although every citizen is by law entitled to surety of the peace when another threatens to do him bodily harm, yet there is a discretion reposed in the magistrate to whom application is made, to be first satisfied that the party complained of is in the wrong. For the protection of the citizens, and to repress malicious and groundless complaints, the magistrate is bound to exercise his judgment in such matter, and he may refuse the warrant, where he has reason to believe, at the time, that the complainant himself was in the wrong, and where time and opportunity are not given to investigate the case. In most of the cases complained of, the magistrate had directed the form of complaints, so as to bring the parties accused within the final jurisdiction of the court. In some cases, a party accused of an aggravated larceny in a dwelling-house, for instance, was charged as a common pilferer, and being found guilty, was sentenced by him to a period of hard labor in the house of correction. If this was done with a corrupt intention, it was a perversion of the law. Because no court may transcend its jurisdiction. And where the court has not the right and power to inflict the whole sentence, which the law enjoins, the case belongs to a higher tribunal. But it belongs to you to decide, in such case, whether the error proceeded from a corrupt motive, or from mistake of the law merely, and under an honest belief at the time, that the magistrate was acting correctly. The fact that the magistrate did not, in any instance, treat the accused with severity, but let them off without exacting the full measure of retributive justice, is peculiarly deserving of a favorable construction. I do not say that he was free from fault in thus leaning to the side of the accused. For the judge must always be true to the law. It is not right for him to sacrifice the rights of the whole in pity

Commonwealth v. Snelling.

to the individual offender. But if errors are ever excusable, those who err on the side of humanity are certainly less deserving of censure, than those who consume themselves and their unfortunate victims by an intemperate zeal for justice. "It is happy for an author, who is about to die," said an eminent critic, "to be able to reflect that he had never written anything against morals and religion."¹ It must be equally happy for a judge, who is soon to render his final account, to be able to say that he has never indulged in a vindictive temper, but has ever endeavored to dispense justice with mercy. It is for you to decide, whether the justice in the particular case complained of by the defendant, which excited his indignation and induced him to publish this libel, actually denied to him justice. It was undoubtedly the duty of the justice to be satisfied, that the complaint did not arise from sudden heat and passion, and that it was well founded. This was according to the usual practice of the court in such cases, and it would not seem that such delay was not consistent with law. The justice must think and act for both parties. But the parties themselves, and most commonly their counsel, are apt to look only or chiefly at those points which are favorable to their own cause. But the judge must not identify himself with either party. He must feel and act upon the principle that both have rights, and that there may be faults on both sides.

The jury returned a verdict of guilty. The defendant was sentenced to pay a fine of fifty dollars and the costs of the prosecution, and to be imprisoned in the common jail for sixty days. From this judgment he appealed to the next supreme judicial court, and recognized in the sum of three hundred dollars to prosecute his appeal according to law.²

¹ Boileau.

² Upon the trial of the appeal before *Putnam, J.*, the defendant was found guilty. The case was then brought before the whole court, upon a motion for a new trial and in arrest of judgment, and the motion was denied.

NOVEMBER TERM, 1833.

COMMONWEALTH v. AARON GUILD.

In the trial of an indictment for a newspaper libel, evidence of the admissions of the editor of the newspaper as to the authorship of the publication, made in the absence of the defendant, were *held* to be inadmissible, until a proper foundation by proof had been laid that the defendant was the author.

The acknowledgment of the defendant is good evidence of the authorship of a libel.

In admitting evidence of the truth of a libel, the court is guided by the libelous publication and not by the allegations in the indictment.

Where, in the trial of an indictment for a libel, the publication set forth that one F. made certain statements of his own conduct while on a jury; evidence of his conduct while in the jury room, as well as of what occurred there generally, was *held* to be inadmissible.

Where, on an indictment for a libel, the jury returned a special verdict, that the defendant did publish, &c., and that he did the same without malice, but with no justifiable motive; it was *held* that this could not be considered as a verdict either of guilty or not guilty, and that a new trial must be ordered.

THE indictment in this case charged the defendant with the publication of a libel upon Thomas French, in the "Boston Daily Advocate," of July 31, 1833. The piece complained of was as follows. "Mr. Hallett: You are authorized to say in your paper, that on Saturday, the day the verdict was given in the libel case, against Moore & Sevey, I heard Mr. Thomas French, one of the jury in that case, speaking of the two jurors who stood out, when he made a remark to this effect, that Mr. Green had contradicted his own testimony, and that he had to work, or did work all night to damn it into them, meaning the two jurors. He also said that if it had not been for Mr. Hallett, he could have done well enough. This is the exact meaning of his language, and I am sure he said *damn it into them*."

I am ready, when called on to testify to this, and I leave my name with you, to be used when called for. Boston, July 30."

The publication of the piece complained of was admitted. The first witness called and sworn for the prosecution was Thomas French, who testified, that on seeing the publication he went to the Advocate office, and saw Mr. Hallett, the editor, with whom he had a conversation. To the question, "did you demand of Mr. Hallett the name of the author of that piece?" the counsel for the defendant objected, and referred to 1 Starkie on Evidence, 389.

THACHER, J. The government has no right to the answer to this question, put in the absence of the defendant, until they had laid a proper foundation by proof, in the first instance, that the defendant was the author. For though the piece says that the writer had left his name with the editor, yet he may be called as a witness for that fact. If the editor said to the witness, that the defendant was the author, it would be but hearsay evidence, secondary in its nature, and would not be legal proof of the fact. Proof having been given to the jury, that the defendant was the author, it would then be open to prove the declaration of the editor, in the absence of the defendant, as he had referred to him, and he would undoubtedly be bound by his declaration. Just as the maker of a note, or of bill of exchange would be bound by the answer of the person whom he had authorized to act for him, as to the acceptance or payment of the bill. — The witness afterwards saw the defendant, and conversed with him. To the question, "did he acknowledge himself to be the author of the piece?" the counsel for the defendant objected, on the ground that by calling the editor, or other persons in the Advocate office, better testimony would be obtained than the confession of the defendant himself. Confessions were usually given under circumstances of apprehension, distress and partial coercion, and were apt to be misunderstood and incorrectly reported. He referred to the above authority in 1 Starkie, 339; 1 Phillips on Evidence, 86-88-91.

But the court overruled the objection, on the ground that the voluntary confessions of a party were invariably received in evidence, and were generally esteemed as evidence of the best quality ; but that it was for the jury to estimate their value in every particular instance.

French and other witnesses related several conversations which they had with the defendant at different times, in which he acknowledged himself to be the author of the piece, though without any malicious intent. From their testimony relative to these confessions, it appeared that he went to the Advocate office and stated the facts, which Hallett took down from his mouth with a view to publication, and that the defendant knew that this was the intention, and did not object to it. Here the government rested the case.

Hallett, in opening the defence for the defendant, contended, 1. That there was no evidence that the defendant wrote, printed, or published the piece, and that the present was a new attempt to convict a citizen of the offence of libel. 2. That the publication was not a libel in itself, because it did not contain the characteristics of the offence. 3. But that if the piece was in itself a libel, the matter of it was nevertheless true. From *Rex v. Bear*, (1 Ld. Raym. 414,) he argued, that writing was essential to a libel ; but he insisted that the defendant did not write this piece. He cited also Holt's Law of Libel, 244, 279, 282 ; *Rex v. Woodfal*, (5 Burr. 2661) ; 1 Russ. on Crimes, 228 ; 4 Bl. Com. 150 ; 2 Starkie, 851. He further argued, that a general confession by a defendant that he was the author of a piece would not amount to proof of publication by him, and that government was bound to call the printer and publisher as witnesses of that fact. Also, that the publication was not libellous, because it was not calculated to expose the individual named in it to a legal prosecution, nor to blacken him in the estimation of the public. He then offered to prove, by the confessions of Thomas French, and by the testimony of Joseph W. Barnes and Andrew Campbell, the two jurors who

held out during a whole night, and who would not concur in the verdict with the other jurors till late in the forenoon of the following day; that French did use violent language, and was guilty of other improper conduct in the jury room, in urging the two to agree with their fellows. The county attorney objected to this inquiry, and hence arose the question, whether proof of the conduct of Thomas French in the jury room, while the jurors were engaged in conclave, considering the case, and forming their verdict, was admissible in evidence? The county attorney insisted, that the question was, not what French had done in the jury room, but what he had said to Guild. If he had not said to the defendant, that he had damned the obstinate jurors, it could not be material to inquire what he had done. But the counsel for the defendant insisted, that if he could show, as he expected would be proved by the witnesses, that Thomas French did damn the two jurors, while they persisted in their opposition to the opinion and belief of the rest of the panel, and that he used great urgency with them, to overcome their obstinacy, it would tend to prove, that he had actually said what was asserted in the libel. It proved, too, the truth of the libellous matter complained of, and amounted to a justification. For no jury would consider that French was injured by the publication if, in truth, it amounted to an assertion only of what he had done. The truth of the matter consisted rather in what French had done, than in what he had said.

THACHER, J. The defendant offers to prove what was said and done by Thomas French in the jury room, while the jury were considering the verdict; and the question is, whether the witnesses may be examined to this point. If the decision of this question depends on the allegations in the indictment, it may lead to one result. If, however, it is to be settled by the contents of the publication, the result may be different. The contents of the publication may not support the innuendoes, as they are called, which are used as words of explanation only. For they cannot extend the sense of the expressions in the

libel beyond their proper meaning ; unless where an equivocal expression is used, in which case it may be explained under a suitable recital or averment on the record. Where the words of the libel do not support the innuendoes, it would be ground to set aside the verdict, if it should have been rendered against the defendant. Hence I infer, that in admitting or rejecting evidence of the truth of the matter, we should be guided by the libel itself. The defendant is charged with maliciously intending to vilify and defame the character and credit of Thomas French, and to expose him to be prosecuted for a violation of law, by representing that his conduct as a juror in a certain case was highly offensive and reproachful to the public justice. The libel is upon Thomas French, not upon the jury. It contains no accusation against the jury, that their conduct was in any wise improper. Nothing is pertinent or admissible but proof of the truth of the matter contained in the publication charged as libellous. But there is nothing in that piece which asserts that the jury acted illegally, or that Thomas French did. If there was any fault in the conduct of either, there is no imputation to that effect in the piece. It seems, therefore, improper for either of the parties to go into that inquiry.

What is contained in the publication? The defendant asserts that he, on the day the verdict was rendered, which was after the verdict was rendered, and the jury had been discharged, heard Thomas French make a remark to this effect, "that he had to work or that he did work all night to damn it into the two jurors," who stood out in opposition to the opinion of their ten fellows. The piece does not say, that Thomas French did work all night for this purpose, nor that he used any threat or other improper influence to compel the two jurors to agree with their fellows, but simply, that he uttered such words. Were Thomas French on trial for improper conduct in the jury room, such declaration would be pertinent evidence to prove the fact. "The truth of the matter" then will be to show, that Thomas French uttered such an expression, or one equiva-

lent to it. No more could be inferred from a general demurrer by the defendant to the indictment. When that is proved, either by witnesses or by the defendant's admission, so much will be done in justification of the publication. Such expression being proved, it would have no tendency, I think, on the part of the government, to disprove it, to offer witnesses to show, that no such act was done by the juror while in the conclave. For whether such act had been done or not, he may, at the time referred to, have inadvertently made use of the expression, perhaps jocularly, or by way of a boast, and not seriously, or with an intention to have it so understood and believed. But whether the defendant has, in the publication, truly represented the conversation of Thomas French, is, in fact, very material. If the case before the court were a civil action, brought by Thomas French against Aaron Guild, to recover damages for the supposed slander, which is contained in this piece, and in bar thereof Guild had pleaded in justification, that the plaintiff had damned the two jurors, and had otherwise behaved improperly in the jury room, it would, I think, be a good answer to the claim. For what injury would it be to him to have been accused of saying what he had actually done? But the injury done to an individual by a libellous publication is an indictable offence; because it has a tendency to excite mutual hostility, and leads to a breach of the peace, whether the publication is founded in truth or not. The civil remedy to the injured party is distinct from the criminal accusation. The injury to him may be small compared with the evil example and pernicious tendency of the libel to the public. Hence, what may be ground of defence to a civil action between the parties, when properly placed upon the record, may not be admissible in evidence in the criminal trial. — The evidence of the transactions in the jury room, and of all confessions relating to the same, was therefore excluded. So likewise was evidence offered by the defendant, to show that Thomas French was habitually profane in his conversation. For the court thought,

that although he might have been apt to indulge in profane expressions, it would not follow, that he was guilty of profanity in this instance. If, however, Thomas French should attempt to prove that he never indulged himself in this evil habit, it would be the right of the present defendant to contradict the evidence to this point, and to prove that he was habitually profane. A defendant in a criminal case might now put his character in issue; and *quoad hoc*, Thomas French was to be considered the defendant in that part of this case, where the party on trial was attempting to prove the truth of the libellous matter, and where the party slandered was endeavoring to prove himself innocent of the misconduct imputed to him in the libel. The counsel for the defendant offered to read sundry certificates, signed by ten of the jurors, one of whom was Thomas French, in the case of Moore & Sevey, relative to the proceedings of the jury in their conclave; and cited 10 Johns. 435, and 3 Pick. 376. He further referred to 1 Russell on Cr. 388; 5 Bac. Abr. 206, tit. Libel, to show who shall be considered a libeller, and who the author and composer of a libel. The certificates were excluded.

Parker, for the commonwealth.

Hallett, for the defendant.

THACHER, J., charged the jury substantially as follows. — The present case grew out of a trial in this court, in July last, in which Moore & Sevey, printers, were indicted for a libel upon Samuel D. Greene, in which case Thomas French was one of the jurors. That trial excited a great interest, from the circumstance that Greene was an anti-mason, and the defendants were free-masons. The feelings of both those bodies were enlisted in the case. Both watched the progress of the trial. Much disappointment was expressed by some, and an equal degree of satisfaction was felt by others at the verdict of the jury. As is common on such occasions, some blamed the jury, finding fault with their conduct, and laying hold of any circumstances, which would detract from the weight of that verdict. Some insisted that the

verdict ought not to have been recorded by the court, and soon afterwards, in the vacation, certificates were published in the newspapers, by the jurors, in which they mutually charged each other with improper conduct while in conclave. In case of an error or fault, committed in the course of a trial, or other judicial proceeding, the law always provides a remedy which will be effectual if pursued in season. This is by motion to the court supported by affidavit, if the matter of complaint is not apparent on the judge's minutes, or otherwise known to the court. But it is not possible for the public to correct an error or fault of this kind, and therefore it is useless and mischievous to appeal to the public by publications in the newspapers. If a juror has cause to complain of his fellows, that complaint should be made as soon as he returns into court. He is not obliged to affirm the verdict. If new light has burst into his mind, or if he was compelled to agree by circumstances of duress, or if the verdict was agreed upon by the cast of a die, or other chance decision, and was not the result of judgment, he should declare it to the court. "After the verdict recorded, the jury cannot vary from it, but before it be recorded, they may vary from the first offer of their verdict, and that verdict which is recorded shall stand."¹ I knew a case where the foreman declared, upon his return into court, that he could not affirm the verdict. As the jury had separated, after their agreement, over night, the case was taken from them, and it was sent to a new jury.

The present case is for a libel upon the character of Thomas French. A libel must be injurious to the party defamed, and malicious on the part of the publisher. Although malice, in its common acceptation, means ill-will against a person, yet in its legal sense, it means a wrongful act done intentionally without just cause or excuse. Per Bayley, J., in *Bromage v. Prosser*, (4 Barn. & C. 255.) And the man who publishes slanderous matter calculated to defame another, must be presumed to have

¹ Co. Lit. 2276.

intended to do that which the publication is calculated to bring about, unless he can show the contrary, and it is for him to show the contrary. Per Lord Tenterden, Ch. J., in *Rex v. Harvey*, (2 Barn. & C. 257 ; 5 Bac. Abr. 209 ; Tit. Lib. B. 2, in notes.)

You will first consider what is the issue on trial. The indictment contains a specific charge — that the defendant did frame and make, and did print and publish, and did cause to be printed and published this malicious libel. It contains no accusation against the conduct of the jurors, nor against Thomas French as one of them while they were empaneled in court, and were engaged in the performance of that office ; but that after French was discharged therefrom, he used the expression which is imputed to him. So that what was done in the jury-room is not now in issue, and it was excluded from the inquiry, as not material, and as calculated to mislead you. For the words might have been spoken, although nothing occurred in the jury-room to justify them. And it would not follow that the words were spoken, even if great misconduct had prevailed in the conclave.

The issue to be decided is, whether Aaron Guild is guilty of the charge contained in this indictment. Before you can pronounce him guilty, you must be satisfied that he was the malicious author or publisher of the slanderous publication, and that it is of the defamatory character and injurious tendency which the indictment describes. In other words, you must believe that the charge is true. Did he publish it ? If it was written by himself, or by any other person on his behalf, and published with his consent, he is in law answerable for the publication. If it was written by him, without an intention to publish it, and being obtained from him surreptitiously, was published by some one without his authority or consent, he would not be answerable for the publication. "In all cases," says Lord Holt, "where a man does the act which causes the thing to be what

Commonwealth v. Guild.

it is, that man ought to be construed the doer of such a thing.”¹ And it was said by other judges of the King’s Bench, in the same case, “If A. invents the matter, B. makes rhyme of it, and C. writes it, every one in common understanding may be distinguished by some special term. As A. the inventor, B. the poet, C. the writer, though the law denominates them all makers.”

If you come to the conclusion, after reviewing the evidence, that the defendant wrote or caused this piece to be published, and that its meaning is correctly set forth and explained in the indictment, the only question remaining to be decided will be whether it is an injurious libel upon the prosecutor.

Does the language of the piece import the defamatory matter which is charged in the indictment? Of this you are the proper judges, and you will expect from the court precise instructions. The libel is charged to be against Thomas French, of and concerning him, and of his conduct as a juror; the malicious design charged is, to defame *him*. If you should believe that the piece actually defames the public justice, or any person other than Thomas French, you will not be at liberty to find him guilty, because as the defendant is not accused of intending to defame any one but Thomas French, if he is not defamed, you must find him not guilty. It would be otherwise, if he had been charged with intending to defame A. B. and C., and it appeared that he had defamed only one of these persons; that would be a substantive offence, and would be sufficient to found a conviction and judgment. It may be that the libel was defamatory of the public justice and of the court; but as he is not charged with intending to bring either into contempt, you must acquit the defendant, notwithstanding it is alleged to be to their reproach.

Suppose it proved to your satisfaction that the defendant published the piece, and with the malicious intention alleged,

¹ *Rex v. Bear*, 1 Lord Raymond, 419.

does it import, according to the natural meaning and common use of the terms, that "Thomas French did work all night to control, abuse, influence and ill treat the two jurors, and illegally and improperly to force said verdict into them by indecent, improper and profane language, and illegally, improperly, and against their belief and conviction, to force and compel them to agree to the verdict?" This whole inference in the indictment is drawn from that expression, that "he had to work, or did work all night to damn it into them."

What impression is naturally made upon the mind, when you hear it said by a person just discharged from court, where he with others had rendered a verdict in a case of great interest and expectation, *that he had worked all night to damn the verdict into two of their number?* Does it import that he used profane language and improper means to make them agree? They were sworn, well and truly to try the cause, and a true verdict to give according to the law and the evidence. After hearing the witnesses, the arguments of counsel, and the instructions of the court, they retire to their room to agree upon a verdict. If, when they meet in conclave, they find that they are divided in opinion, it is expected that they should review the case, that they should hear the opinions and reasons of each other patiently, with mutual respect, and with a sincere desire to arrive at a correct result. All violence in language or conduct, all menaces, every attempt to overawe and to compel a juror to give up his own honest opinion for that of another, are inconsistent with the office of judgment. In reading the piece complained of as a libel, does it raise in your mind the belief that Thomas French thus undertook to oppress and control the free minds of the two obstinate and dissenting jurors? does it lessen him in your estimation, and do you believe that it may justly subject him to the disapprobation of the community? Was it the intention of the defendant by this piece to lessen the confidence of the community in the justice of this court, by representing the deliberations of the jury as a scene of violence, and

the verdict not the fruit of deliberation, but of intimidation and force? If the words, in their natural meaning and common use, intend that the juror was guilty of such indecent conduct, the defendant may be justly considered guilty of the slander.

If, therefore, you believe that this innuendo or inference is correct, then you will find defendant guilty. You being judges of all facts in the case, must decide upon the meaning of the expressions contained in the piece in the first instance. If defendant should afterwards submit this question to the consideration of the court by a motion in arrest of judgment, it will then be proper for the court to give to it a more full and minute consideration. But if you think, that from this expression it can only be inferred that the discussion in the jury room was protracted, and much time consumed in it, that the dialogue between the jurors was animated, and that their passions were much excited, and that there was a conflict of words only, without threats or force, you may, I think, fairly doubt whether the language of the libel sustains the indictment. For you must allow to jurors reasonable liberty of thinking, speaking and action. For their verdict must flow from free minds, restrained only by regard for the truth of the facts and the law of the land.

The jury retired, and at a late hour on Saturday evening, the 26th of October, they returned into court with a special verdict. After sending them to their room twice to amend the verdict without success, it was recorded. It was as follows :

"The jury find that Aaron Guild did publish, or cause to be published, the paragraph in the Boston Daily Advocate, a paper printed in Boston, July 31, 1833, set forth in the indictment, reflecting on Thomas French.

"The jury find that the said Guild did the same advisedly, but not maliciously or with the intent to injure the character or reputation of the aforesaid Thomas French.

"The jury find that the said Guild had no justifiable motive in publishing or causing to be published the said communication in the aforesaid paper.

JESSE BIRD, *Foreman.*"

The attorney for the commonwealth moved that sentence be pronounced as on a verdict of guilty. The counsel for the defendant moved that he be discharged as on a verdict of acquittal; and the case was continued for advisement.

The respective motions of the parties were argued by their counsel, at a special hearing, November 6th, 1833.

Parker contended that if the jury had not returned a verdict on all points in the indictment, they had yet found sufficient to authorize the court to pronounce sentence as on a verdict of guilty. They had found that the defendant was guilty of the publication, and that it reflected on Thomas French. By refusing to pronounce judgment, the court would impute to the jury inconsistency. That where so much was found, as amounted to a substantive offence, the court might enter judgment. *Jones v. Kennedy*, (11 Pick. 125.)

Hallett argued that the verdict amounted to an acquittal. A special verdict is always to be favorably construed. *Hawks v. Crofton*, (2 Burr. 698.) That it is not possible, from the verdict, to tell the meaning of the jury. And a doubt is always to operate in favor of the party accused. 5 Burr. 2666; *Ropps v. Barker*, (4 Pick. 239); *Porter v. Rummary*, (10 Mass. 64.)

The points made in argument by the counsel, will more fully appear in the opinion of the court.

THACHER, J. The attorney for the commonwealth has moved that sentence be passed, as for a conviction, upon the verdict, which was found in this case against the defendant, at the last term. The counsel for the defendant has likewise moved, on his part, that the defendant should be discharged, as upon a verdict of acquittal. It is an indictment against the defendant, in which the grand jury present, that he, intending to vilify and injure one Thomas French, and to expose him to a prosecution, upon the 30th day of July, 1833, at Boston, &c. did maliciously frame and make, and did write, print, and publish in the Boston Daily Advocate, of, and concerning him, and

Commonwealth v. Guild.

concerning his conduct as a juror, in a certain case, wherein he had been returned, qualified and sworn, a false, scandalous, and libellous publication, the tenor of which is set forth, and which is alleged to be to his great scandal and damage. In addition to the tenor or words of the libel, their meaning is averred by innuendoes in legal form, from which it would appear that the piece imports "that said Thomas French unlawfully worked, during one night, to control, abuse, influence, and ill-treat two of his fellow-jurors, in that case, and illegally and improperly to force them to agree upon a verdict by indecent and profane language, against their belief and conviction." So that the complaint against the defendant was, that he had published a libel against Thomas French, which imputed to him this injurious charge. Upon the trial, the jury found "that he did publish, or cause to be published, the paragraph in the Boston Daily Advocate, set forth in the indictment, reflecting on Thomas French; that he did the same advisedly, but not maliciously, or with the intent to injure the character or reputation of the said Thomas French; and that he had no justifiable motive in publishing, or causing to be published, that communication."

The attorney for the commonwealth insists that the special verdict finds the defendant guilty of the publication, and that this authorizes the entry of a general verdict of guilty against the defendant, if in the opinion of the court, the publication imports an injurious libel upon the character of Thomas French. Although the verdict expressly negatives malice, in its popular signification, or any intent to injure the character of Thomas French; yet it finds that the defendant published the piece advisedly, and without justifiable motive, which is that legal malice which constitutes one of the elements of the offence. But the attorney for the defendant contends, in his argument, that the finding of the jury amounts to a verdict of not guilty; and he denies that any judgment can be rendered upon it, on account of its uncertainty. He insists that if the court did not discharge the defendant, it could set aside the verdict, and

must order a new trial. If the jury meant to find the defendant guilty, they should have found not only the publication, but the meaning which is attached to it, and the malice ascribed to its author, in the indictment. The court also must be satisfied that the piece is of that injurious tendency. But inasmuch as the verdict does not admit such construction, and special verdict, in criminal cases, are to be construed favorably for the defendants, the court will be justified, and, he thought, bound to enter a verdict of acquittal.

A libel must contain some imputation on the manners or morals of the party defamed, calculated to bring him into odium or contempt; or it must contain some imputation or charge of misconduct, which, if true, would expose him to a criminal accusation. The essence of the offence consists in the malicious intent of the party, although malice will not make the publication a libel, if the words do not import scandal. In this case, the special verdict finds that the party published the libel without justifiable motive; but it expressly negatives malice in him, and any intent to defame the prosecutor. But when the jury say that the defendant published the piece, reflecting on the character of Thomas French, without justifiable motive and advisedly, and in the same breath, that he acted without malice or intent to injure the reputation of Thomas French, it seems to me to amount to a contradiction; it is both inconsistent and repugnant, and it is difficult to say what they meant; for a wrongful act done to another intentionally, and without just cause or excuse, is malicious in the eye of the law. But I do not consider that I have the right to infer a guilty motive, when it is expressly negated by the finding of the jury. "Where the intention of the jury is manifest, and beyond doubt, the court will set right matters of form."¹ And if a verdict can be concluded out of the finding to the point in issue, the court will work and mould it into form, according to the real justice of the case.² But in this verdict the elements are contradictory, and will not unite.

¹ Per Lord Mansfield, 2 Burr. 698.

² Hob. 54.

The jury were instructed, before they retired, to make up their verdict, that before they could pronounce the defendant guilty, they were to be satisfied that he published the piece, or caused it to be published ; that it was of the defamatory character and injurious tendency which is alleged in the indictment, and that it was maliciously done by the defendant. But in this special verdict, they expressly negative the malicious intent, and they do not find the truth of the innuendoes. " Wherever the verdict is on a point not material, the court is not bound to give judgment upon it." ¹ A general verdict of guilty would affirm not only the publication, but the truth of the innuendoes ; that is, that the piece has the opprobrious meaning which is alleged. For the meaning of the libellous publication and the intent, are facts to be settled by the jury in the first instance. It is true, however, that if the jury find a defendant guilty of a libel, an appeal lies to the court, who may set aside the verdict, if they find, on examination, that the piece imports nothing scandalous or injurious to the individual, who complains of the wrong. Such motion, follows the conviction by the jury ; and we are now considering the effect of this special verdict. Unless the verdict finds the party guilty, or the finding amounts to that, the court cannot pass a sentence, because that is the judgment of law, which is consequent on guilt. On the other hand, unless the verdict find the party not guilty, or to that effect, he cannot be discharged, because he is not entitled to such judgment, unless the record shall show that he is innocent. He may, however, be found guilty of part of the accusation which is contained in the indictment, and be acquitted of the residue ; and if such finding amounts to a distinct offence, he may, in such case, be sentenced for that part, and discharged of the residue. " A verdict that finds part of the issue, and finding nothing for the residue," says Lord Coke, " this is insufficient for the whole, because they have not tried the whole issue where-

¹ Stra. 927 ; 2 Rolle's Abr. 99.

with they are charged.”¹ Hence, the verdict of not guilty of the residue, where a partial verdict only is found, is essential, because the verdict ought to answer the whole charge, and the jurors must perform their duty thoroughly, “although the court cannot refuse a special verdict, if it be pertinent to the matter put in issue.”² In every criminal accusation, as well as in civil cases, both parties have the right to a verdict, which shall answer the whole charge. The general verdict of guilty or of not guilty, is most unexceptionable, and most to be desired in every case. As it is the right of the accused, in all cases, not to be tried and put in jeopardy twice for the same offence ; it is the right of the government that he shall be tried once ; which always supposes either a free confession of guilt by the defendant, or a verdict, on which the court may pronounce the sentence of the law, or an order of discharge. Where such verdict has been rendered as manifestly contains not an answer to the whole indictment, and on which the court cannot pronounce judgment, it is a mistrial, and the case must be sent again to the jury.³

As the verdict in this case is not an answer to the whole accusation, the defendant is not entitled to be discharged ; and on the other hand, as it does not find him guilty of the publication in manner and form as is contained in the indictment, nor according to the innuendoes, judgment cannot be rendered against him. Both motions are therefore denied, and there must be a new trial.

A new trial was ordered, but upon an intimation from the court that the public justice had already been satisfied, the county attorney fully acceding to the suggestion, entered a *nolle prosequi*.

¹ Co. Lit. 227 a.

² Ib. 228 a.

³ See *Com. v. Moor*, post.

JANUARY TERM, 1834.

COMMONWEALTH v. ABNER KNEELAND.

The editor and publisher of a newspaper is answerable in law if its contents are libellous, unless the libellous matter was inserted by some one without his order and against his will.

Under the act of 1782, c. 8, (Rev. St. c. 130, s. 15,) presumptuously reviling the name and attributes of God, or the fundamental principles of the common belief of Christians, is blasphemy.

The act of 1782, c. 8, is constitutional.

THE indictment in this case was under the act of 1782, c. 8. It charged that the defendant, on the 20th day of December, 1833, printed and published in a newspaper called the "Boston Investigator," of which he was the editor, a blasphemous and profane libel. The indictment set forth an obscene article, printed in the "Free Inquirer," a newspaper published in the city of New York, and copied into the Investigator, concerning Jesus Christ. Also another article copied from the same newspaper, ridiculing the common forms of prayer. Also a third article, consisting of a part of a letter from the defendant to the editor of the "Trumpet," a newspaper published in Boston, which was as follows :

"1. Universalists believe in a god which I do not ; but believe that their god, with all his moral attributes, (aside from nature itself,) is nothing more than a chimera of their own imagination. 2. Universalists believe in Christ, which I do not ; but believe that the whole story concerning him is as much a fable and a fiction, as that of the god Prometheus, the tragedy of whose death is said to have been acted on the stage in the theatre at Athens, five hundred years before the Christian era. 3. Universalists believe in miracles, which I do not ; but believe that every pretension to them can either be accounted for on natural principles or else is to be attributed to mere trick and

imposture. 4. Universalists believe in the resurrection of the dead, in immortality and eternal life, which I do not ; but believe that all life is mortal, that death is an eternal extinction of life to the individual who possesses it, and that no individual life is, ever was, or ever will be eternal."

Parker, for the commonwealth, opened the case, substantially, as follows : —

I shall consider, 1. The statute law relating to this offence ; 2. The common law ; 3. The importance and paramount duty of enforcing these laws, and punishing all violations of them ; 4. The testimony on which the prosecution is founded, and by which the guilt of the defendant will be made manifest. (The whole statute was here read.) It is possible that the meaning of some words may be questioned. Their signification will, therefore, be taken from the best sources. Dr. Webster, in his dictionary, says, *To blaspheme* is to utter blasphemy — to speak of the Supreme Being in terms of impious irreverence — to speak evil of — to utter abuse or calumny of. *Blasphemy*, he says, is an indignity offered to God by words or writing ; that which derogates from the prerogatives of God. In another book, (Hume on Crimes,) it is stated that *blasphemy* consists in the denial of the being, attributes, or nature of, or uttering impious or profane things against God, or the authority of the Holy Scriptures. It is committed by uttering such things in a scoffing and railing manner, &c. The word *wilfully* in law means intentionally — done on purpose — not accidentally — or unconsciously. But the statute itself, on which this prosecution is founded, undertakes to define what amounts to blasphemy. I consider this statute, being in full force and unrepealed, as establishing as a part of the law of this commonwealth, these propositions. 1. That there is a God whose name it is possible to blaspheme. 2. That denying or contumeliously reproaching God is wilfully blaspheming his holy name. 3. That denying his creation, government, or final judging of the world is blaspheming his holy name. 4. That reproaching Jesus Christ, is blas-

Commonwealth v. Kneeland.

pheming the holy name of God. 5. That reproaching the Holy Ghost, is blaspheming the holy name of God. 6. That reproaching the Holy Scriptures, is blaspheming the holy name of God. 7. That exposing the Holy Scriptures or any part of them, to contempt and ridicule, is blaspheming the holy name of God. There is but one crime stated — one *corpus delicti* — that is, *wilfully blaspheming the holy name of God* — that is the only thing prohibited by the statute.

As the constitutionality of the law is to be called in question, the propositions I maintain, are, that the law is constitutional, and that the Christian religion, at the time of the adoption of the constitution, was part and parcel of the constitution itself: and without faith in the Christian religion, this commonwealth could have had no government prior to the year 1820, and no lawful convention in that year to amend the constitution. These propositions I shall prove from the constitution itself.

1. In the preamble — It recognizes God as the great legislator of the universe, and acknowledges his superintending providence, and prays for his direction. 2. Next — The second article in the bill of rights declares it to be the right and duty of all men in society, publicly and at stated seasons to worship the Supreme Being, the great creator and preserver of the universe; who is called God in the same article. 3. The third article provides for the worship of God, and requires parishes to make provision for the public worship of God, and the support of public teachers of religion, and provides that every denomination of Christians shall be under the protection of the law. 4. The eighteenth article speaks of the necessity of piety, and observance of it in making laws. Piety here means religion, and this article strongly proves the constitutionality of the law and the right of the legislature to make it. 5. In part the second, ch. 1, sec. 1, art. 3, at the close — courts have full power to administer oaths to witnesses. The object of an oath is to search the conscience, to make an appeal to God and his justice for the truth of what the witness says.

6. In ch. 2, sec. 1, art. 2 — No person shall be eligible as governor of this commonwealth, unless he shall declare himself to be of the Christian religion; that is, the religion of Jesus Christ. This article clearly incorporates the Christian religion into the constitution. 7. Chap. 2, sec. 2, art. 1. — The lieutenant governor shall be qualified in point of religion as the governor. 8. Ch. 5, sec. 1, art. 1. — The honor of God, the advantage of the Christian religion is provided for, by encouraging arts, sciences, and literature, and the ministers of congregational churches are made officers of the university. 9. Ch. 6, art. 1. — The governor, lieutenant governor, all counsellors, senators, and representatives, as a condition precedent to entering on office, shall declare that they believe in the Christian religion. Here the whole legislative power must have this faith and avow it publicly in presence of many witnesses. How could a religion be more incorporated and become part of a constitution? Such was the constitution when this law was made. In 1820, the constitution was altered by a convention, but that convention could not have been called but by the act of a Christian general court. That convention derived its authority solely from Christians. Without Christians there could be no general court prior to the convention, and without a general court there could have been no convention. [See c. 5, art. 10, providing for calling a convention.] The constitution itself, the paramount law of the land, establishes the Christian religion, makes it a part of itself, and maintains the positions I have stated — each and every one of them. But there is another important article in the constitution which bears on this point. In the sixth chapter, on oaths, &c. art. 6, it is stated all the laws which have heretofore been adopted, used, and approved in the province, colony, or state of Massachusetts, shall still remain and be in force until altered or repealed by the legislature, &c. The makers of the constitution must be presumed to have known the existing laws. There were existing laws in relation to religion when the constitution was adopted, and that constitution

must therefore have reference to them. That constitution providing that all the laws which had been adopted, used, and approved in the province, colony, or state, of Massachusetts Bay, and usually practised on in courts of law, shall remain in force, until altered by the legislature, in fact confirms and reenacts those previous existing laws. Similar laws then are constitutional. Let us then go back and see how the law against blasphemy stood in the province, colony, and state; because the framers of the constitution must be presumed to have reference to them. (Col. Laws, 58, 61, 302.) The principle of the laws has been the same from the beginning, but the modes of punishment have varied as to this as well as to other crimes; in the course of time, all punishments have been ameliorated. The colony laws against atheism and blasphemy, remained until the revolution. Then the constitution was proposed, discussed most ably and thoroughly, and adopted. Then the new act was passed, on which this indictment is founded, within a very short time after the adoption of the constitution, and passed, too, probably by the very men, or many of them, who made the constitution itself, and has been in operation ever since, never obsolete, never repealed or modified. But the common law, also, is retained by the constitution—having been adopted, used and practised upon in our courts, and must, therefore, also be presumed to have been referred to by those wise men who drafted, and those who adopted the constitution: and this common law is still the law of the land as to crimes and civil suits, except so far as altered by the legislature. Also, the constitution of the United States recognizes the common law as part of the law of the land, in article seventh of amendments. But if this case fall not under the statute, then, such an obscene and blasphemous libel is an offence at the common law, (Starkie on Slander, 499,) and punishable as such in this court as much as murder, assaults, perjury, and other crimes at common law; and this common law is made constitutional by the constitution itself.

I will proceed now to consider what the common law is in

relation to this subject. The general principle is, that the law will restrain and punish all open and public attacks upon religion, upon the authority of the scriptures, and upon the Founder of Christianity, because the belief in religion, so construed, constitutes the only binding obligation among men, and its denial tends to the subversion of all law and order in society.¹ Blasphemy is not only an offence against God and religion, but a crime against the laws, state, and government, and therefore punishable by indictment; for to say religion is a cheat, is to dissolve all those obligations whereby civil society is preserved; and to reproach the Christian religion is to speak in subversion of the law.² This was said by Lord Chief Justice Hale, than whom, it has often been said, that a wiser man, a better lawyer, and one who had a greater respect for the rights and liberties of the subject, Great Britain never produced. Sir Philip York, afterwards Lord Hardwicke, said in *Curl's case*,³ "every publication which reflects upon religion, that great basis of civil government and society, is indictable." Serjeant Hawkins⁴ enumerates five species of offences against God, at the common law, embracing some of the very modes of blasphemy described in our statute law. Lord Raymond declared in *Woolston's case*,⁵ "Christianity, in general, is part of the common law, and therefore to be protected by it. Whatever strikes at the very root of Christianity, tends manifestly to the dissolution of the civil government." The same doctrine is expressed in the case of the *King v. Curl*.⁶ Lord Mansfield said, (2 Burn's Eccles. Law, 218,) "for atheism, blasphemy, and reviling the Christian religion, persons have been prosecuted and punished upon the common law." His successor, Lord Kenyon, in *Williams' case*,⁷ confirmed the like doctrine. Lord Ellenborough, in the case of the *King v. Eaton*,⁸ expressed the same opinion. Chief Justice

¹ 3 Merivale's R. 390.² *Taylor's case*, 1 Ventris, 293; 3 Keble, 607.³ Strange, 788.⁴ Pleas of the Crown, c. 5.⁵ Str. 634; Fitzgibbon, 64.⁶ 17 Howell's State Trials, 154.⁷ 26 Howell's St. Tr. 653.⁸ 31 Howell's State Trials, 927.

Commonwealth v. Kneeland.

Abbot, in *Waddington's case*,¹ was of the same opinion, as also were Justices Bayley, Holroyd, and Best. Best, J. used this language; "a work containing such arguments, is, by the common law, a libel, and the legislature has never altered this law, nor can it ever do so whilst the Christian religion is considered as the basis of that law." The like opinions were expressed again by the last mentioned justices in *Carlile's case*.² Lord Chancellor Eldon is equally clear upon the same subject. In *Pearson's case*,³ he said, "prior to the statute, blasphemy was an offence punishable at the common law." The same opinions are maintained in treatises upon libel and slander.⁴ Obscene libels are also indictable offences at common law.

In the year 1820, the constitution was revised by a convention chosen by the people of the state for that purpose. No alteration was made in any particular, but in the form of certain oaths.

This is not repealing the Christian religion; this is not extirpating it from the constitution, nor in anywise invalidating its obligations. It merely regulates the form of the oath of office, substituting a shorter form in lieu of two others. And this is clear, because not a single statute law has been altered or modified, abrogated or repealed, in consequence of those amendments, by any one of twelve successive legislatures, who have been fond enough of altering the laws in other respects, perhaps too forward to change the laws of the land. The statute against blasphemy still remains, and still is in full force. And this amendment of the constitution, if so it must be called, can in nowise benefit the case of this defendant, because in the new constitution, or rather the new enactment of the constitution, the second article in the bill of rights, still inculcates the duty of worshipping God, and, also, because in the very new forms

¹ 1 Barn. & Cres. 26.

² 3 Barn. & Ald. 161.

³ 3 Merivale, 407.

⁴ Holt's Law of Libel, 64, 70; Starkie on Slander, 487, 493.

⁵ Holt's Law of Libel, 72; 2 Strange, 790, 792; *Wilkes's case*, 4 Burr. 2530.

of oath, the constitution asserts the existence and attributes of that God.

(The county attorney then proceeded to consider the importance of enforcing the laws, and in regard to the law relative to malice in libels he cited Stark. on Slan. 407, 359 ; Stark. on Ev. part 4, p. 880-82 ; Holt's Law of Libel, 46-70. To the point of the defendant's liability for the publication, he cited 2 Hawk. P. C. 131 ; *Rex v. Walter*, 3 Esp. 21.)

The foreman of the printing office of the "Investigator," was then called as a witness, who testified to the publication of the alleged libellous publications. He also testified that during the absence of the defendant in New York, a clerk at the "Investigator" office took the "Free Inquirer" from the post-office, and caused the extracts therefrom to be printed.

Dunlap, for the defendant, then opened the case, and introduced testimony to establish the good moral character of the defendant. The following is a summary of his closing argument.

1. The case is not within the statute.

The first article complained of, which was extracted from the "Free Inquirer," printed at New York, is not a denial nor cursing, nor reproaching any person or thing, but a statement in an improper manner of the doctrine of the belief in the miraculous conception of the Virgin ; and in the statute no mention is made of the Virgin. There is no direct denial of the truth of that doctrine in the article. Any one has a right to assail that doctrine by argument or satire. It has always been a subject of controversy among the different sects. The Unitarians, who hold the doctrines of Priestley and Belsham, do not believe in the miraculous conception. Those professing a belief in Christianity have used coarser and stronger language in attacking the belief of their fellow Christians. Dean Swift's "Tale of a Tub," written to insult the Roman Catholic religion, is filled with grossness and obscenity far greater than in this piece of the defendant. Further, this article was printed in the

Commonwealth v. Kneeland.

absence of the defendant, and without his knowledge or consent. He is civilly but not criminally responsible. The English decisions on the law of libel, in favor of the crown, are entitled to but little respect here. There is no American decision recognizing the position of Lord Kenyon, as cited by the county attorney. But in *Almon's case*, (5 Bur. 2686,) it was decided that when a book was sold in a bookseller's shop by the agents of the defendant, it was only *prima facie* evidence of a publication by the principal.

The object of the second article complained of was to expose to ridicule the strange modes of prayer which many adopt. This has always been a matter of controversy. The Puritans disparaged with as much scorn and contumely modes of prayer different from their own as this article contains. Upon a fair construction, the article does not ridicule the Supreme Being, and if it did, the defendant cannot be convicted under our laws and constitution.

It is not pretended that the third article complained of contains any "contumelious reproaching of God." The offence, if there be any, consists in denying God. The words are: "Universalists believe in a god which I do not; but believe that their god with his moral attributes, (aside from nature itself,) is nothing but a chimera of their own imagination." This is simply a disbelief in the creed of the Universalists. Were it an expression of the defendant's *disbelief* in the Supreme Being, it would not be a *denial* of God, within the meaning of the statute. The defendant expressly disavows atheism. In criminal cases, in matters of doubt, the most favorable construction is to be given. But by every rational and grammatical construction, it is apparent that the defendant intended to express no disbelief in God. There is no point after the word "God" in the first clause. The point is after the word "not," and it is a semicolon. But in the next paragraph the punctuation is different. There the words are "Universalists believe in Christ, which I do not," with a comma after the word Christ. In the

latter sentence, the defendant intended generally and absolutely to express his total disbelief in the divinity of Jesus Christ. In the first paragraph he did not intend to express generally and absolutely his disbelief in God, but in "*a God*," that is, the "God" or belief of the Universalists.

The defendant does not say, the Universalists believe in God, which I do not. But the expression is, "Universalists believe in *a God* which I do not." This article *a* limits the meaning as he intended it should. He intended to say merely that he did not believe in "*a God*," that is, the "God" or creed of the Universalists. What do the grammarians teach us, respecting the office of this article? The rule in Murray is that the article *a* "is used in a vague sense to point out *one single thing of the kind* in other respects indeterminate." The Trinitarian says Unitarians believe in *a God* which I do not. Is the Trinitarian an Atheist? Does he deny God by this expression? Surely not. So far from professing a total disbelief, he intends to express a more extensive belief, than the Unitarians, to declare, that he believes in more than they do, that he believes in the Father, the Son, and the Holy Ghost, whereas Unitarians believe only in the divinity of God. Apply this rule to the sentence under consideration, and it is apparent, by the grammatical rule of construction, that the writer intended to designate and distinguish one particular God or belief of the kind of Gods, or creeds, worshipped or cherished in the world. Again, the article *a* is sometimes used, in a definite sense, and even sometimes called the definite article *a*, as will be perceived in the note to Alger's Murray, in the Cincinnati edition, 1832. When he speaks of his disbelief in Christ, he does not say *a Christ*, but simply, absolutely, unequivocally, without limit or qualification, declares that he does not believe "in Christ." He would have adopted a similar construction of the sentence, and not have used the article *a* in the paragraph respecting God, had he meant to declare simply, absolutely, unequivocally, without limit or qualification, a disbelief in God. There

Commonwealth v. Kneeland.

can be no rational ground for a doubt of the real meaning of the defendant, when the next clause of the sentence is considered. The words are "Universalists believe in a God which I do not ; but believe that *their God* —." This clearly shows, that the words "a God," and the words "their God," are used in the same limited sense, and that the object was to define and distinguish the God or creed of the Universalists, as a particular faith, from which the writer dissented. Had his intention been otherwise, the article *a* would have been omitted in the first clause of the sentence, and the word *their* in the second, and the sentence would have been thus framed, "Universalists believe in God, which I do not, but believe that their god," &c. The defendant in adopting the expression "a god" and "their god" to designate a particular belief, is sustained not only by popular usage, but by some of the highest authorities in church and state. (Mr. Dunlap here read several passages from "Stuart on Religious Liberty," and from Jefferson's letter to John Adams, dated April 11, 1823.)

The remaining part of the article complained of, and now under examination, contains a statement of the defendant's disbelief in the miracles, and the Christian doctrine of the resurrection of the dead. An attack upon a profession of belief in the doctrines of Christianity, is not blasphemy, within the statute. The statute defines in what blasphemy shall consist. The blasphemy must be wilfully denying God, cursing or contumeliously reproaching God, his creation, government, and final judging of the world, cursing or reproaching Jesus Christ or the Holy Ghost, or cursing or contumeliously reproaching the Holy Scriptures, by exposing them or any part of them, to contempt and ridicule. Expressing a disbelief in the miracles, and in the Christian doctrine of the resurrection, is none of these things described in the statute. It is not denying God. If the doctrine advanced, or the disbelief professed by the defendant, be contrary to the doctrines and belief contained in the Scriptures, yet there is no cursing nor contumeliously re-

proaching any person or thing, as is required to bring a case within the statute against blasphemy. A simple denial of God is within the statute. But in all other cases, there must be more than a denial, there must be a cursing or contumeliously reproaching of the persons or things described in the law, to bring a case within the purview and operation of the statute.

It cannot be contended that because doctrines are denied, which the court and jury may believe to be contained in the Scriptures, therefore the Holy Scriptures are exposed to contempt and ridicule, and the statute against blasphemy is violated. If such a doctrine be sound, the Orthodox court and jury would be bound by their oaths and consciences, to convict the Unitarian, who should profess his belief of blasphemy, for the Orthodox do not consider the Unitarian doctrines to be the doctrine of the Scriptures. In the same way, and upon the same principles, the Orthodox believer maintaining his sincere opinions, would be in danger of conviction of blasphemy, by a Unitarian court and jury. That which might be considered the true doctrine one day, would be the next adjudged blasphemy, according to the changing success of various religious parties, obtaining one after another, the political power of the state, and the means of oppressing their adversaries. (Mr. Dunlap here read from the letter of Jefferson, above alluded to, where Calvin is spoken of as blaspheming God; and from Dr. Channing's sermon, preached at New York, where the Orthodox are spoken of as calumniating God.)

The jury are the final judges of the law of every criminal case, where a general verdict of guilty or not guilty is returned. A general statute must be construed with strictness. The acts proved must be the very acts described and prohibited by the language of the statute, giving that statute a strict limited construction in favor of the accused. (Bacon's Maxims of the Law; 1 Bl. Com. 88; 2 Bl. R. 1226.) The court still hold the power, in case the prisoner should be convicted, to fasten him to the pillory, and to set him on the gallows. (Act of 1782, c. 81; Act of 1812, c. 134; Act of 1826, c. 105.)

Commonwealth v. Kneeland.

This statute, upon general principles relative to human legislation, cannot be enforced by juries, without renouncing their reason, or abandoning their consciences. It is beyond the grasp of finite faculties. It cannot be ascertained in what sense the legislature used the word *God* in this statute ; therefore the law is unintelligible and cannot be enforced. If the word is used in a general sense, it includes all the various gods which are worshipped, and the idolater may claim to enforce the statute against those who deny his gods. If it is used in a limited sense, it must be assumed that the idolater denies the true God ; so that the profession of his belief subjects him to be placed at the bar as a criminal, at the same time that it admits him to be a competent witness in our courts. (Phillips on Ev. ; *Curtiss v. Strong*, 4 Day, 51 ; Swift's Ev. 48.) A similar difficulty arises, if we attempt to determine whether the word *God* is used in a Trinitarian or Anti-trinitarian sense. In a matter of conscience, man is responsible to his maker only ; and if a juror be a Trinitarian or a Unitarian, and believes this statute made to establish an erroneous doctrine, he cannot sustain it ; so, likewise, if he believes all penal laws hostile to Christianity. If the statute is anything, it is a sectarian law to compel a belief in the Trinity. The people of the commonwealth, at the time of the passage of this act, were, generally, believers in the Trinity. Under the act, it is blasphemy to curse or reproach Jesus Christ or the Holy Ghost. (Mr. Dunlap, for the purpose of comparing this statute with " the English Trinitarian " statutes, read the " profession of faith " from the statute of 1 William and Mary, c. 18, the " toleration act," s. 17, of same statute ; the statute of 9 and 10 William and Mary, for the suppression of blasphemy and profaneness ; from the Province Laws of Massachusetts, against blasphemy and heresy ; the act of 1697, against atheism and blasphemy. To show that statutes should be compared to ascertain the meaning of a law, he cited 1 Bl. Com. 60 ; cases in Big. Dig. 740. This statute declares it blasphemy to deny God's " final judging of the world." This was

a blow aimed at Universalists, and no Universalist can sustain this statute by his verdict. (He then read from Adams's View of Religions, an account of the creed of the Universalists.) The statute declares it blasphemy to expose to contempt and ridicule the canonical scriptures "or any part of them." The version intended, was undoubtedly the translation made in the reign of James I. Every part of that version, is, by this statute, held to be genuine. The legislature had no right to make a law, thus to cramp the mind, and to compel the adoption of errors. (For the purpose of showing the difference between the various versions and their errors, he read from Henry Ware, Jr.'s Letters of 1823; from Dickinson's New and corrected Version of the New Testament.)

By the common law, publications are considered libels which are offensive to morals, and hostile to the established religion and the established church. The case of the defendant does not fall within the doctrine of libels, relative to immoral publications, without reference to religion. In such cases, a blow is struck at the morals of the community; but an attack upon a particular religious belief, however coarse and improper, is not necessarily an attack upon morality. There is no settled religious belief exclusively identified with morality. The indelicacy of the first article, published by the defendant, is rather an offence against propriety, than against morals. For that article, he is not morally nor legally accountable. Mere indecency of style, like indecency in conversation, is not indictable.

Another branch of the law of libel which does not reach the present case, is respecting the abuse of persons. Abusive attacks upon opinions are not punishable by law. Thus unrestrained freedom of literary criticism is permitted. The law shields the character of a person, not his opinions. The article complained of contains no abuse of a private character. Professor Stuart makes the true legal distinction in his letter on religious liberty. (Mr. Dunlap here read a passage from the letter.) The evil of abusive compositions cures itself. The coarseness of the

Commonwealth v. Kneeland.

abuse destroys its influence. The offence of an attack against religion is an offence against heaven, and to heaven belongs the prerogative to avenge. The moment it is assumed that an attack upon cherished opinions is an attack upon persons holding them, either no opinions can be examined, lest personal offence may be given, or else the peace of society will be lost. All freedom of opinion will be destroyed unless opinions may be freely examined. If they are correct they will stand; if incorrect the sooner they are exploded by reason, the better it is for the cause of truth.

It is contended, that an attack upon Christianity is necessarily an attack upon morality. Then it must be that they are not one and the same thing. But they are not inseparable. If so, there never could have been any morality without Christianity. We hear, from our most distinguished divines, that morality and religion are distinct. Was there no morality before Christ in the days of Homer and Socrates and Cicero? All history shows us that morality can exist without Christianity. But we have been told that Christianity is a part of the common law. Has the common law embraced all the religions of England which have obtained during its continuance? There are in the books some sayings of judges supporting this doctrine, especially of Sir Matthew Hale; but his authority is equally good to support a prosecution for witchcraft. Jefferson has entirely invalidated the cases relied upon by the government to support this doctrine in his letter to Major Cartwright. (Mr. Dunlap here read from the letter.) Here in an ancient case involving church interests, the court say, in ecclesiastical cases we give credit to the ancient writings of the church, that is, to the old records, &c. The word "ancien," is mistranslated "holy," and upon this perversion, hang all the English decisions; and it is by force of these decisions that the liberty of speech and press, and the rights of conscience are to be subverted in this country. Jefferson has been falsely called an unbeliever in Christianity. He was a firm believer in the doc-

trines taught by Christ, and a sincere Unitarian. The law of Christianity of England is founded only in the statutes made to protect England from Protestantism at one time, and Popery at another. We have not adopted these statutes. It was to escape them that the pilgrims left England.

2. The statute is in violation of the letter and spirit of the constitution.— It has been said that the constitution of the United States has adopted the common law, and the seventh article of the amendments and a decision in the circuit court are relied upon. There is a doubt how far the common law is a guide in civil suits in the United States, but none as to criminal causes. There is no offence at common law in the jurisprudence of the United States. *United States v. Hudson*, (7 Cranch, 32.) There is no provision relative to religion in the constitution in the first article of the amendments, which is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The constitution and laws of the United States, so far from sustaining this statute against blasphemy actually destroys its validity. By the constitution and laws of the United States, persons of every religious faith may be admitted as citizens.

Let us now examine the constitution of our commonwealth. In the first place, we are referred to the religious test oath or subscription in the constitution, which was as follows. "I, A. B. do declare that I believe the Christian Religion, and have a full persuasion of its truth." If the insertion of this test oath and subscription in the constitution, incorporated the Christian religion, then striking that test oath and subscription out of this instrument, must have struck out Christianity, and by the doings of the convention of 1820, this test oath and subscription were struck out of the constitution. The following oath is now taken by public officers. "I, A. B., do solemnly swear,

that I will bear true faith and allegiance to the commonwealth of Massachusetts, and will support the constitution thereof, so help me God." Another clause, relied upon to prove that Christianity has been incorporated into the constitution, is this provision: "And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another, shall ever be established by law."

But this has also been struck out of the constitution. There has been a late amendment of the constitution. In this amendment, the words are not as formerly in the constitution, "every denomination of Christians;" but the words are, "every denomination." The word "Christians" was struck out. It is not so much those provisions of the constitution which have been read by the counsel for the government, as that which has not been read. It is that provision which emancipates the people from the shackles of tyranny in religion which mankind had worn for ages — that provision which abolished forever all penal laws and penal prosecutions on the subject of religion, and declared, in the most solemn manner, that no subject shall be hurt, molested or restrained in his person, liberty or estate for his religious profession or sentiments. This is universal toleration, the vital principle of Christianity. Will this court or any enlightened Christian tribunal, disregard the pure precepts, and the perfect example of universal toleration, taught and displayed by Jesus Christ? Let us admit that our constitution does adopt the Christian religion. It is adopted in the incorporation of the principle of universal toleration, the great principle of Christianity. It is adopted in the declaration in our bill of rights, that no subject shall be hurt, molested or restrained in his person, liberty, or estate, for his religious profession or sentiments.

There are three propositions in the second article of the bill of rights. The first declares that it is the right and duty of

men to worship the Supreme Being. The second contains a declaration that no subject shall be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience. The third contains a declaration, that no subject shall be hurt, molested or restrained in his person, liberty, or estate, for his religious profession or sentiments. The only restrictions imposed upon the full and perfect enjoyment of these rights, are, that the public peace shall not be disturbed, nor others obstructed in their religious worship. The words are plain, and the language is explicit which proclaims the principle of universal toleration. If there were a doubt, the most liberal construction should be adopted, for that is in accordance with philosophy, philanthropy, the genius of our institutions, and the character of our people. If none are to enjoy protection from being hurt, molested or restrained in person, liberty or estate, except those, whom the legislature and the courts may consider to be of "religious profession or sentiments," the provision in the bill of rights is altogether superfluous, for those who are of "religious profession or sentiments," according to the opinion of the legislature and the courts, never can be in danger of being hurt, molested or restrained, in person, liberty or estate for their "religious profession or sentiments," and therefore need no protection. This bill of rights is a shield for the weak, not a weapon of persecution for the hand of the strong. It is intended for those who alone need protection — those who profess unpopular sentiments respecting religion.

The established rule of construction of all written laws is thus stated in Dane's Abridgment, vol. 6, p. 598. "With regard to the different parts of a statute, there is one general rule of construction; that is, the construction of each and every part must be made on a full view of the whole statute; and every part must have force and effect, if possible; for the meaning of every part is found in its connections with the other parts; and it cannot be believed the legislature intended any part of the

Commonwealth v. Kneeland.

statute should be without a meaning, or without force or effect. These rules are not peculiar to statutes, but hold in regard to wills, deeds, and all instruments where the question is, What did the maker mean? Each ought to be so construed, if it can be, as to prevent any clause, sentence, or word, being superfluous, void, or insignificant; for this obvious reason, no maker of either can be supposed to mean that any part, clause, or word, shall be insignificant, superfluous, or void." Apply this principle of construction, that every word is to have its effect, to the clause in the second article of the bill of rights. The words of this clause are as follows: "And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; *or for his religious profession or sentiments*; provided he doth not disturb the public peace, or obstruct others in their religious worship." In the first place all who worship God are protected in the most ample manner. After that come these words "or for his religious profession or sentiments." This extends the constitutional safeguard, even to those, if there be such on the face of the earth, who do not worship God. These latter words are separated from the former phrase in the clause, by the disjunctive conjunction "or" which is used to distinguish a clear separation from, or an "opposition of meaning" to, the class of persons before described. If this be not so, these words, "or for his religious profession or sentiments," are without any meaning, and altogether superfluous. All who worship God according to the dictates of their consciences, are first protected. Then to remove all doubt, even those who do not worship God, if there can be any such, are also protected. These words, "or for his religious profession or sentiments," must have the effect to throw the constitutional shield of toleration over all sorts of unbelief, or else they are a dead letter, and must be considered to have been used by the framers of the constitution without a meaning. This is not to be supposed, unless one of the best

established rules of construing laws be violated in a case where it should be most regarded. In the course of this trial, it has been intimated, that there is a nice and delicate distinction to be made, in considering the privileges secured by this second article of the bill of rights, between the right to enjoy opinions and the right to maintain and attempt to propagate them. Such a distinction is more nice than wise. Such a construction renders the constitution a mere mockery, for a man does not need the constitution to protect him in the enjoyment of his secret opinions. By the constitution, the defendant is not to be hurt, molested, or restrained, in person, liberty, or estate, for attempting to promulgate his sentiments respecting religion. If he have a right to hold those opinions, he has a right to make them known. (Mr. Dunlap here read from Stuart to show the doctrine of Orthodox Christians, that "the friends of truth must trust to argument, to reason, to conscience, and to God.")

Since the adoption of the constitution of Massachusetts, the constitution of the United States has been established as the supreme law of the land. That constitution, we have seen, has not a word in it on the subject of religious or irreligious belief, except in the amendments which declare that congress shall make no law to establish or prohibit religion. But the constitution, as we have also seen, declares that congress shall have power to establish a uniform rule of naturalization. Congress have done so, and under the naturalization laws citizens of other countries of every religion, and of no religion, are admitted to become citizens of the United States. If then, any man be admitted a citizen of the United States, under this law, is he not entitled to bring with him and profess and propagate his religious sentiments? The statute of blasphemy in this state, not only violates the constitution of the commonwealth, but it cannot stand, consistently with the constitution of the United States, and the laws of naturalization under that constitution.

Mr. Dunlap closed with a summary of the history of persecutions in this and other countries.

Parker, in closing for the government, contended, substantially, as follows: — The counsel for the defendant has argued, first, that the case set forth in the indictment does not fall within the statute. Secondly, that if it does, then the statute itself must be attacked and obliterated as unconstitutional and void. There is no question between the parties about the facts. They being established, the question now is as to the character of those passages. Do they, or any one of them blaspheme the holy name of God, in all or any one of the ways pointed out in the statute?

This is the same question raised by the defendant's counsel in other language in stating the first point of defence, to wit: does the case proved fall within the statute? The question is simply, what is the purport, effect, meaning and motive of the passages alleged to be obscene and blasphemous. The *corpus delicti* is, "blaspheming the holy name of God;" and this may be done in several ways, and proving it in one way only, will support the indictment. The criminal passages in the libel may be classed under four divisions. 1. Denying God. That of course includes the denying of his creation of, government of, and final judging of the world, which constitute four of the modes of blaspheming God's holy name, as pointed out in the law. 2. Reproaching Jesus Christ. 3. Reproaching the Holy Ghost. 4. Contumeliously reproaching the Holy Scriptures. First, the defendant is guilty under the first head, and he openly and unqualifiedly avows Atheism. What are the words written by his own hand, and published by his direct order in this libel? I maintain that the words "Universalists believe in a God, which I do not," are an unqualified avowal of Atheism, a direct and "positive denying of God, his creation, government, and final judging of the world." That is the natural meaning of the language used, — the idea that strikes every rational mind upon its first perusal, without resorting to any nice analysis or grammatical criticism. The counsel for the defence is, in my opinion, wrong, both in the law he has

stated and in the forced and unnatural construction of the defendant's language. All the courts in Westminster Hall, and all in the United States, who have tried libels, hold the true rule now to be, that juries shall construe the words of a libel, (they not being equivocal in themselves,) to mean what mankind in general from their common use and natural import would believe them to mean. The real question is, what upon the first perusal would men in general think, what idea would mankind receive from the words, "Universalists believe in a God, which I do not?" They would believe, as I contend to you, that he intended to convey this meaning, I do not believe in a God, though the Universalists do. The context shows that he was pointing out differences between Universalists and himself, and the first is, they believe in a God — I do not — that is the first difference. This is the natural import of the words in the libel, taking the whole piece together. Now a grammatical analysis will bring us to the same conclusion. What does the neuter relative pronoun *which* agree with? What is its antecedent? Being in the neuter gender, it refers to a thing, not to a person. A part of a sentence may be the antecedent to a neuter pronoun relative. Let us paraphrase the language. "Universalists believe in a God, which (thing) I do not believe." What thing? I answer, the belief in a God, in any God. If he meant differently, his language would have been different. If he intended not to profess and avow Atheism, not to promulgate it, his language would have been, "Universalists believe in a God in whom I do not believe" — *whom* being a masculine personal pronoun relative, referring to "a God" as its antecedent, that is, a particular God of the Universalists — or thus — "Universalists believe in a particular kind of God, in whom I do not believe" — or thus — "Universalists believe in a God, but I do not believe in a God like theirs — the God I believe in, (for I do believe in a God) has different attributes from theirs." It is then manifest and clear, on every view of the subject, that what he said, and what he meant to say, the

idea he intended to convey to the world was this — I differ from the Universalists, first, in this: they believe in a God, I do not believe in a God — that is a complete difference between us, a difference *toto cælo*.

But, secondly, this libel in another place, blasphemes the holy name of God, by contumeliously reproaching him. Contumelious reproach is sarcastic, sneering, gibing ridicule, insulting and exposing to shame and derision. So the best dictionaries inform us. I now, therefore, call your attention to that part of the libel which relates to prayer. Can any man of common understanding, any human being one grade above an idiot, read that passage and communication, and not see in it contumelious reproach of God? Impossible! God, the Almighty, most holy, most sublime, omniscient, and eternal God, spoken contemptuously of, as a "poor gentleman," a subject of pity, more to be pitied than General Jackson! To assert that death is an eternal extinction of life, that there is no eternal life, is denying God, and his judging of the world, and this in the third place, clearly falls within the statute, and would alone support the indictment. This, also, is too plain to need a word of comment. Thus, under the first division, the holy name of God is blasphemed. 1. By avowed, palpable, unblushing Atheism, denying his existence and attributes. 2. By the scandalous and impious irreverence and contumelious reproach, in the objectionable article on prayer. 3. By denying the resurrection of the dead, and God's judging the world. Consider whether Jesus Christ is also contumeliously reproached in the obscene and impious publication of the defendant. It is as manifest as language can make it. 1. He is expressly denied, and the defendant unhesitatingly declares, "that the whole story about him is a fable and a fiction." 2. The obscene paragraph, on the first page of the libel, is a most indecent, scurrilous, sarcastic and sneering reproach on Jesus Christ. I will not offend you by reading or commenting on it. Did the libel contain no objectionable passages but these two, you would be

compelled to find the defendant guilty, so full is the measure of his guilt, under the charge in this indictment. The counsel for the defence repeatedly, and with apparent sincerity, denied the defendant's liability *criminally* for the offensive article published in his absence. I repeat it, that the rule of law is that the proprietor and publisher of a newspaper is *criminally* answerable for a libel published in his paper in his absence; and though he never saw, heard of, or approved the libellous matter. I have already given the authorities upon this subject. As to the communication on prayer, there is no evidence that he did not read and approve of it before he published it, and the presumption of law, in the absence of such testimony, is, that he did both: and the other libellous piece was his own composition, and published over his own signature. By the law, therefore, he is criminally answerable for all three pieces. But I have not yet pointed out to you all the modes in which the defendant, in the alleged libel, has blasphemed the holy name of God according to the statute. Two more remain. The Holy Ghost, as well as Jesus Christ, is contumeliously reproached in the obscene passage, and also again in the denial of miracles, and in attributing them to trick and imposture. The holy scriptures are contumeliously reproached in the libel

1. By denying God—who is proclaimed by them as their Author, and whose existence and attributes are therein revealed.
2. By denying his creation, government, and judging of the world, as declared and taught throughout those scriptures.
3. By declaring the whole story of Jesus Christ, as therein narrated, to be a fiction and a fable.
4. By denying the miracles therein related as true, and attributing them to trick and imposture.
5. By denying the resurrection of the dead, immortality, eternal life, and the final judgment of the world.
6. By that infamous obscene passage.

The second point in the defence, set up by the defendant's counsel is, that although the case and proof may and do fall within the statute, still you must acquit the defendant, because

Commonwealth v. Kneeland.

the statute is unauthorized by the constitution, is not constitutional, and is void and not binding. Having anticipated this point, which I had been informed was to be discussed in the course of the trial, and having expressed my views fully upon the subject in the opening of the case, I deem it unnecessary now to repeat the same. Nor have I since heard anything said in the very elaborate and cumbersome argument from the other side, which, in my judgment, in any degree shakes the positions I then maintained. I called your attention to the various parts of the constitution, its language in reference to God and the Christian religion ; its confirmation of all former laws adopted and practised upon, both the common and statute law, of the colony, province, and state of Massachusetts Bay : I showed you what the common law and the statute laws were, in relation to blasphemy prior to the constitution, and pressed on your consideration that this last statute was passed among the first permanent laws, immediately after the adoption of the constitution, and was enacted by men, many of whom were members of the convention who formed and created that constitution. I stated to you that that statute had been enforced as often as once in every five years since its date, in one county or another, within the commonwealth, that every judicial tribunal before whom it came in question, had considered it as constitutional, and inflicted its penalties for its violation, the last and a recent case, having been recently tried before Judge Wilde, of the supreme court of this state, on the southern circuit. I reminded you that the constitution had been before the people for amendment, in the year 1820, and no objection was made to this law, and no debate introduced into the convention, in which it was hinted or alleged to be unconstitutional ; that considering the many prosecutions which had been instituted under it, and the many times it has been reprinted by order of the legislature, by commissioners, those learned and vigilant men, appointed to superintend the new editions of the statutes, it ought now to be considered as settled and fixed law,

that it was a constitutional statute, and as much so as any one in the book.

The counsel for the defence has said, that if there was an Unitarian or Universalist within your panel, he could not give a verdict enforcing this law, without committing treason against his own conscience. This argument is neither correct nor fair. Whether a man has blasphemed the holy name of God, in any of the modes of doing it, pointed out in the statute, or has not, is a simple matter of fact, as much as whether a man has stolen a piece of personal property, or not : and, whatever your religious creeds may be, if you are honest and true men, if the fact be proved, you, as jurors, must say so, or violate truth ; and I can conceive of no greater treason to conscience, than the giving of a false verdict, after you are sworn to give a true one. Nor can there be any mistake concerning what facts constitute the offence of blaspheming God's holy name, because to prevent any such mistakes, the statute is very explicit in enumerating and describing those facts. This is so clear, and the gentleman in the defence was so much oppressed with a sense of its weight and force, that he resorted to what I consider a desperate plunge to escape from it. The gentleman has said that the legislature had no power, right, or authority to make a law against blasphemy, nor to define what constituted blasphemy, and that you of the jury were of the people, the country on which the defendant had put himself for trial, and might blot this law out of the statute book, if you should think it was wrong that it should be there. The law commits to juries no such power. It is absurd, in my opinion, to suppose juries in any circumstances are above the law and constitution, and may abrogate both if they please. You cannot repeal the law even if you should dislike it ; and you are in duty bound to sustain this prosecution, if the facts on which it is founded be proved, whatever your religious opinions may be. It seemed to me a very strange argument, though boldly advanced by the prisoner's counsel, that because God is incomprehensible and past

Commonwealth v. Kneeland.

finding out, therefore the legislature cannot pass a law to prevent blaspheming his holy name. Atheism and blasphemy are detestable to Christians of every creed, and men of every religious denomination can unite under this law, and conscientiously give a verdict, according to the evidence, against an open blasphemer of God's holy name. I cannot pass over, without a notice, a very extraordinary argument, drawn from the naturalization laws of the United States. To use the gentleman's own language, "the argument proves too much to be sound." If the Gentoo, if the Turk, if the Jew, by becoming a citizen of the United States, has the unlimited power and right to bring with him his religion, and live according to its principles and customs, then the naturalization laws and the constitution of the United States authorize parricide, the murder of aged parents, as practised on the banks of the Ganges; polygamy and the establishment of seraglios, as allowed by the Koran; and all the Jewish laws of retaliation and cruelty which have been so eloquently denounced, an eye for an eye, a tooth for a tooth, &c.

You have been plausibly told that you are the people, you come out from the people, you represent the people, who made the constitution and the laws. I hope the learned gentleman did not mean to suggest, that as such people you had the power to repeal the constitution and laws. It would be the most monstrous principle ever suggested in a court of justice, that the jury were above the laws, and not bound by them, but had an arbitrary discretion, according to their own ideas of expediency, if they did not like a law, to consider it, and make it a dead letter. Nor, for myself, can I see anything in this law against blasphemy, which deserves the outpouring of the vial of wrath, which the gentleman has bestowed upon it. If there be anything wrong in its principle or form, it is very remarkable that it was not discovered before, and that during its constant operation for half a century, nobody has petitioned the legislature for its repeal. It required boldness of no ordinary degree

to say to a jury, you ought to blot this law out of the statute book. In my humble judgment, you have no more right to make this law a dead letter, or refuse to enforce it, than you have to repeal or abrogate the law against murder, highway robbery, or forgery. No juror has arbitrary power. No man on the jury has the right to do as he pleases. He is under the law, restrained by the law, governed by the law, directed by the law, as much in the jury room as he is out of it, as he is in all other places; perhaps more so there than elsewhere, because, in addition to the obligations of duty which everywhere are in force, he has in the jury room the sanctions of his oath, the appeal to God, superadded to all other motives to do right.

THACHER, J. In committing this case to you, I shall endeavor to confine myself to the points of law on which it depends. In one event, the defendant will have right to review the judgment of this court before a higher tribunal. Although this does not lessen the obligation which is imposed on you, to render a true and impartial verdict, or on the judge, to devote to the case his best learning and diligence; yet it serves to demonstrate the paternal care of the law, to protect the citizen from injustice. If the defendant did not publish the libel complained of, you will have no necessity to consider its contents. It is extracted from a newspaper, published in this city, called "Boston Investigator," of which the defendant is editor and publisher. This makes him answerable in law for its contents, having been published by his agents, and for his emolument. His mind pervaded and directed the work. He is not to be relieved from this responsibility, unless he can clearly satisfy you that the libel was inserted in the paper by some one without his order and against his will. It is not denied, that he was knowing to the publication of all the extracts, which are set forth in the indictment, with the exception of the first, which relates to the incarnation and miraculous conception of Jesus Christ. This was taken from a paper which was first published in New York.

The two preceding numbers had been published with the defendant's approbation. The third was received, the witness says, during his absence, and was inserted of course. It does not appear that the workmen had received any orders to delay the insertion till the defendant should return. But the witness says, that it was not taken from the editor's drawer. To the question, "was it the order of the editor, that nothing should be inserted in the paper but what came from his drawer?" he replied, *no such order was ever given*, but it was so understood. Now it does not appear, that the defendant, on his return, disapproved of the publication; nor has he ever disavowed it. If such a disavowal would not have altered his legal responsibility, it would have had its weight with you, and would certainly have mitigated the act in the view of the court. If the editor of a newspaper, or other publication, can show that a libel was inserted in his paper contrary to his order, and surreptitiously, it would, I think, be a good ground of defence. But you must judge, whether the defendant has shown, as to this first article, any such excuse — and if not, he is answerable for that, as well as for the other articles of the libel. By not denying it, he has, I think, affirmed the act of his agent, and made himself answerable for the publication.

You perceive then, that the defendant, once a minister of the gospel, is on trial for writing and publishing an obscene, impious and blasphemous libel against the Supreme Being, and the Christian religion, whereby it is alleged that he has offended against the common law, and also against a statute of this commonwealth. It is called an *impious* libel, because it is considered to have been written in a manner and with an intention, inconsistent with that reverence, which is due from a man to his Creator. It is styled a *blasphemous* libel, because it denies and contumeliously reproaches the holy name of God, his creation, government, and final judging of the world; — because it contumeliously reproaches Jesus Christ, the Holy Ghost, and the holy Word of God. This description is founded on the

offence of blasphemy, as it is described in an act of this commonwealth, which was passed immediately after the adoption of the present constitution.¹ But it has always been regarded as an offence from the early settlements of the country. And unless the law in this behalf has been repealed, either expressly or by implication, it is still an offence. The proper meaning of blasphemy, at common law, appears to be profaneness against the general principles of religion and morality.² "It consists in the denial of the being, attributes, or nature of, or uttering impious and profane things against God, or the authority of the holy scriptures. But it is only committed by uttering such things in a scoffing and railing manner, out of a reproachful disposition in the speaker, and, as it were, with passion against the Almighty, rather than with any purpose of propagating the irreverent opinion."³ When such impious expressions are committed to writing, it becomes written blasphemy, and it is a blasphemous libel: certainly not a less offence against the act for its permanent form, in which it may be read by all mankind. In such case the exact words appearing, they may be weighed by the rules of just criticism, and nothing left to conjecture.

But you will carefully observe, that the defendant is not on trial for the principles of his religious faith. It would be singular to put a man on trial for articles of religious faith, when he avows that he has none. There is no such offence known to our law, as heresy in belief, or as non-conformity to an established form of worship. The law of this commonwealth recognizes no standard of faith, nor any established form of worship. There is no ecclesiastical tribunal in this commonwealth, invested by law with power to inflict spiritual censure upon offenders for the good of their souls. The only ecclesiastical tribunals which are known in this commonwealth, if they may be considered as such, are those, where the members have associated together under a church covenant, binding in con-

¹ Act of 1782, ch. 8.² 3 Merriv. 379.³ Hume, II. 558.

Commonwealth v. Kneeland.

science, for the purpose of social worship and instruction, with an agreement to watch over each other for mutual edification, to impart to each other counsel and advice, and with right to admonish and expel a member, who shall violate his religious engagement. Such voluntary associations have not the right to impose fines, or to subject an offender to civil disabilities. Any member may withdraw from the society — and the church may on its part, for just cause, refuse further fellowship with a brother. The connection being voluntary, its continuance depends on the will of the parties, and may be dissolved by either. Ecclesiastical councils among churches of the congregational order, consisting of the pastors and delegates from neighboring societies, invited, are merely advisory bodies. They usually assemble to witness the regular introduction and ordination of persons into the office of the gospel ministry, and to assist in that ceremony, or to compose differences which may have arisen in a church. The result of their conference is usually respected in courts of justice, like the opinions of referees in civil cases, but these councils have no civil power, and they can only act, by their advice, upon the consciences of the parties. If the defendant on trial has not committed an offence against the peace of the commonwealth, or against some known statute, you must find him not guilty. But as a libel of this description has not, within my recollection, been a subject of criminal prosecution in this state — certainly not in this court — it lays upon us the necessity of recurring to the principles of law, on which it is considered to rest.

The charge against the defendant is for publishing an obscene and impious libel against the Supreme Being. If an individual may be severely punished for publishing a base and injurious slander against a fellow-citizen; it would seem to be a great defect in the law of a well regulated state, if there were no punishment for him, who should maliciously slander Almighty God, the eternal, immutable, and infinitely perfect Being, the Creator and Governor of all things, from whom government is

derived, and by whom it is prospered. Not to restrain such impiety, would be to allow it. Because God is not swift to punish impious men in this life, for offences committed against him, which at the same time affect the order and peace of society; some profess to believe that there is no God, no future life, no final retribution. Are such men to be permitted, at their pleasure, to inflict deep wounds in the moral and religious feelings of the rest of the community, by impious and obscene writings? The belief of a God is the first principle both of natural and revealed religion. Mankind have, in every age, and in every degree of civilization, believed and worshipped such a being; and it may fairly be inferred, that what men have always believed, nature must needs have taught. Whoever believes in such a being, recognizes his providence in the government of the world, of states and empires, over families and individuals. No legislator, ancient or modern, has undertaken to construct a system of civil-polity on the principle of Atheism. No society could long exist on such principle. The truth of this axiom has been practically demonstrated in our own age, and by one of the most polished nations of Europe. To speak reproachfully of the Supreme Being, who is regarded by the pious as the source of all wisdom and of all good influences, has never been permitted by any civilized nation. In our own commonwealth, from its first settlement, such irreverence has ever been regarded, both as the height of impiety, and as a crime against the state.¹

Human laws, without the aid of religion, will do but little either to perfect the moral character of individuals, or to preserve the public peace. The good order and happiness of a society depend more on the morals and manners of the people, than on the number and severity of its laws. To the existence of civil society, there must be laws and courts of justice. The great object in the latter is the discovery of truth, which is

¹ Act of November, 1646; Laws of the colony of Massachusetts Bay, 56.

Commonwealth v. Kneeland.

affected by means of judicial oaths, by which the actions and intentions of men are revealed. An oath is an appeal to Almighty God, whose providence is believed to regard the actions of men, justice being the object of his delight, and injustice of his displeasure, to *help* the witness, as he shall speak the truth. The forms of oaths have been constructed in all nations with a view to solemnize the consciences of men. One form of oath among the ancients, was in these words: *as certainly as the eternal God liveth, I will speak the truth.* Paul says, *I call God for a record upon my soul, that to spare you I came not as yet unto Corinth.*¹ The sanction of an oath is wanted on many great and solemn occasions, as well as in courts of justice. But the good of society requires, that men should refrain from invoking the name of their Maker, except when they are engaged in the offices of religion, or they are authorized so to do by the laws of the land. And whoever proclaims, either in words or by writing, that there is no God, and presumes to assert that he is a chimera, a mere fiction of the imagination, forfeits his right to testify in a court of justice, and offends against the constitution and laws of this state. To deny the being of a God, is to take away the very foundation both of natural and revealed religion. The truth of a particular system of revelation may be denied; because the facts on which it rests may be matter of dispute. But he who denies the existence of a God, must deny also the possibility of all communications from God to man, however necessary for his welfare. Such denial indicates, I think, great perversity of mind; — for the belief of a God is derived from the nature of man, which cannot be disputed, and from the internal consciousness of man, of which there is still less ground for dispute.

If the libellous publication for which the defendant is on trial, should be found by you to be obscene as well as impious, and

¹ 2 Cor. i. 18, 23; and Dr. Macknight's commentary and notes on the passage.

to contain a disgusting mixture of religious discussion, irreverent thought, and impure language; it will enable you to judge of the intent of the writer: — whether it was to correct errors in opinion, and to impart truth, which would be both lawful and commendable; or to demoralize the reader, and to offend his respect for sacred things by coarse and vulgar thoughts, and by indecent expression. In general, it is undoubtedly true, that he who allows himself in obscene and impious language, must have a depraved heart. It will be for you, then, to decide, after having read and carefully weighed the publication, whether it is obscene and impious; if that should be your opinion and belief, it will be your duty to find the defendant guilty. But the defendant, by his counsel, who has exhausted in his behalf all the topics of argument, arising from legal investigation or historical research, has contended that the case is not within the law against blasphemy, and if it were, that that law is not within the constitution; — that by the constitution of this commonwealth, all religion is a thing between a man and his Creator, and that men may write, speak, and publish on all religious subjects with impunity, according to the dictates of their conscience. He contends, that to treat even the religion of the country with contumely and reproach, is no offence against society, and is not punishable by human laws. The individual so offending, is accountable only to his conscience and to his God. He may be a subject of prayer, but not of human punishment.

It would have been an incredible thing if a race of men, descended from the Puritan settlers of New England, who had sought a refuge in this wilderness, that they might enjoy a pure religion according to the dictates of their conscience, should in the lapse of a century and a half, have so far departed from the sentiments of their fathers, as to discard all religious considerations, when they were forming a political compact, which was to be a rule for their conduct, and for that of their posterity in all future time. We find, however, that the framers of the con-

stitution had not degenerated from the character of their ancestors, although their religion partook of the spirit of a more enlightened and liberal age. They recorded upon the frontispiece of the constitution, their grateful acknowledgment to the goodness of the Great Legislator of the universe," for affording to them, in the course of his providence, an opportunity deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government for themselves and their posterity ;"—and they "devoutly implored his direction in so interesting a design." They thus recognized the being of a God — his providence in the government of states and empires — and the duty of individuals and communities to pray to him for his guidance in human affairs, and especially when they were about to enter upon any great design, which was likely to be followed by permanent effects. In the second article of the declaration of rights, they declare, that it is the right, as well as the duty, "of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe." Next, that "no subject shall be hurt, molested, or restrained, in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience ; or for his religious profession or sentiments ; provided he doth not disturb the public peace, or obstruct others in their religious worship."

In thus allowing all persons to worship God according to the dictates of their conscience, the people of this commonwealth effectually established a universal toleration of all religions, so far as to put their disciples under legal protection ; and it was thus made the duty of the legislature to pass such laws, as would enable them to enjoy their peculiar rites of worship undisturbed. Christians of every denomination, Protestant and Catholic, Jews, Mahometans, the disciples of Confucius, and the Bramins of Hindostan, whose worship would not disturb

the public peace, and whose manners and customs would not offend against our laws, might all rest in peace under the broad shadow of this fundamental law of the republic. The first fruits of this article was the act of 1782, c. 8, declaring the offence of blasphemy. "If any person shall wilfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world, or by cursing, or contumeliously reproaching Jesus Christ, or the Holy Ghost, or by cursing, or contumeliously reproaching the Holy Word of God," he shall suffer the penalty which is therein declared.

It is evident that this act, by its letter and spirit, was intended to restrain and punish all those who should presumptuously revile the great first principle of all religion, natural and revealed — the name and attributes of God. As we were at that time, and still are, a great community of believers in the Christian revelation, it is equally clear to my mind that this act was further intended to preserve the public peace, and to protect the feelings of all Christians of every sect or party, from violation, by restraining and punishing impious men who should presume to revile the fundamental principles of their common belief. All Christians profess to believe in the divine Unity :— but a very large proportion hold, that the Godhead consists in Father, Son, and Holy Ghost — three persons but one God, from all eternity. The great majority of Christian professors, both in the new and old world, believe in this mystery of a trinity of persons in one God, and worship him as such. For the purposes of this trial, at this time, all that concerns us is, not the truth of the doctrine, but the fact. There have, however, been in every age of the church, there was at the adoption of the constitution, and there is now, another class, much smaller, I know, than the great body to which I have just referred, who believe in one God, supreme and undivided, and who regard him as the only proper object of religious worship. They offer prayers to him in the name of the "one Mediator

Commonwealth v. Kneeland.

between God and man, the man Christ Jesus." And they ask of the Father, in his name, and for his sake, to confer upon them the gifts of the Holy Spirit in this life, and eternal happiness hereafter. It is wholly immaterial, for the purposes of this trial, which of these grand divisions of the Christian church is most free from error. Let no man, nor any body of men, presume upon their own perfections, nor expect to be free from error in sentiment or conduct, till they arrive at a better state. It is sufficient for us now to know, that the constitution and this act of the legislature which emanated from it, meant to restrain and punish all who should presume, to the disturbance of the peace, wilfully to revile and calumniate the fundamental principles of natural and revealed religion, as they were held generally by the people of this commonwealth. It was the policy of the government to restrain the citizens, as much as possible, from wars among themselves, and from all persecution for conscience' sake. The words of the act are, I think, broad enough to admit this extensive construction. It is consistent with the spirit of the constitution. It tends to promote peace and charity, which is the bond of perfection among different sects of Christians; and it imposes a most necessary restraint on those persons, who, knowing how much it wounds a man of religion to hear calumnies uttered against his God, hesitate not, still, to exasperate, in that way, the best feelings of his heart.

The celebrated *third article* of the declaration of rights has been recently modified and amended by the people. But it is necessary that we should examine the provisions both of the original article and the substitute. Any act of the commonwealth, which is contrary to the principle of that amendment, is virtually repealed by its adoption. In the third article, the framers of the constitution declared "that the institution of the public worship of God, and of public instructions in piety, religion and morality" were essential to the happiness of a people, and to the good order and preservation of their government." The legislature was therefore invested "with power

to authorize and require the several towns, parishes, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public *Protestant* teachers of piety, religion, and morality, in all cases where such provision should not be made voluntarily." The legislature was likewise invested "with authority to enjoin, upon all the subjects, an attendance upon the instructions of the public teachers, aforesaid, at stated times and seasons, if there were any on whose instructions they could conscientiously and conveniently attend." But an exclusive right was given to the several towns, &c. "at all times, of electing their public teachers, and of contracting with them for their support and maintenance." It was further provided, that the moneys paid by the subject to the support of public worship, "should, if he required it, be uniformly applied to the teacher of his own religious sect or denomination, provided there were any on whose instruction he attended." And it then adds, that "every denomination of Christians, demeaning themselves peaceably, and as good subjects, should be equally under the protection of the law; and that no subordination of any one sect or denomination, to another, should ever be established by law." The amendment or substitute for this article, acknowledges, "that the public worship of God, and instructions in piety, religion, and morality, promote the happiness and prosperity of a people, and the security of a republican government; — therefore the several religious societies of this commonwealth, whether corporate or incorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses. And all persons belonging to any religious society shall be taken and held to be members, until they shall file with the clerk of such society, a written

Commonwealth v. Kneeland.

notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract, which may be thereafter made, or entered into by any such society ; — and all religious sects and denominations demeaning themselves peaceably and as good citizens of the commonwealth, shall be equally under the protection of the law ; and no subordination of any one sect or denomination to another shall ever be established by law.”

By this amendment all societies of every denomination of religion, are entitled to equal protection. They may elect their own teachers, and contract with them for their support, which contracts will be sustained in law. The amendment contains nothing which is disrespectful to religion, or the professors of any religious sect. It considers the religion of every individual as a matter between God and his conscience. It leaves him free to believe or not to believe, to worship or not to worship, and to contribute or not to contribute to the support of a religious teacher. Formerly it was the right and duty of the legislature to compel the citizens to support Protestant teachers of Christianity, if they were not supported voluntarily. But the power is now taken away : and Protestant teachers can now claim no greater protection than is enjoyed by those of every other religion. Still however the citizens enjoy the perfect rights of conscience ; and the name of the Supreme Being, and reverence for religious institutions, still stand in capitals upon the front of the constitution. There is nothing in the constitution or laws of this commonwealth, which permits any one with impunity to publish an obscene and impious libel, reflecting on the Supreme Being or the Christian religion. To tolerate the free circulation of such productions, would prove that we were not sincere men — that we valued neither our religion, nor its author — that while we honored him in word, we yet suffered his name to be calumniated, and his honor to be trampled in the dust. If therefore you find, on inspecting the libel in this case, that it is both obscene and blasphemous, I think that his

defence will have failed, and that the defendant will have offended both against the law and the constitution of the commonwealth.

It is admitted that the passages contained in the indictment are truly extracted from the "Boston Investigator." But I advise you to compare them with the original, and to form an opinion for yourselves. The rule upon this subject is, that a single offensive passage is not to be selected and considered as conclusive evidence against the defendant; but it must be compared with the context; or those other parts of the work to which it seems to bear a relation; and from the whole taken together, your judgment is to be formed. The first passage, on which the counsel for the government relies against the defendant, to prove that he has committed the offence of blasphemy, is contained in what is called the third extract, which is set forth in the indictment. By a reference to the original piece, you will perceive that it is a letter published by the defendant in the Boston Investigator, addressed to the editor of the Trumpet, to remove an erroneous impression which some had, that he was still a Universalist. The learned counsel for the government contends that this is a plain declaration of Atheism, written in such scornful and contumelious language, as to bring it within the act against blasphemy. In asserting what Universalists believe, and what he did not, in the four several specifications, the defendant adopts a similar phraseology. "Universalists believe in a God, which I do not." "Universalists believe in Christ, which I do not." "Universalists believe in miracles, which I do not." "Universalists believe in the resurrection of the dead, in immortality and eternal life, which I do not." But the counsel for the defendant contends, that all that he meant by this assertion was, to say that "the God in whom Universalists believe, I do not"—a form of expression which he asserts, is not uncommon among controversial writers. He insisted, too, that his client actually believed in God, and he repelled with indignation the imputation of

Commonwealth v. Kneeland.

Atheism. You will recollect, that the court observed to the counsel, at this stage of his argument, that it was gratifying to hear him disavow, on the part of his client, the doctrine of Atheism, and that it would be highly satisfactory, and perhaps useful for the defence, that he should then state, what God the defendant meant to substitute in the place of him whom Christians revered. To that observation, the ingenious counsel replied, that his client was not bound to make the explanation — it was a matter solely between him and his God. It was undoubtedly within the discretion of the defendant to give such explanation or not. But the court expected, from the course of the argument, that there was something in the piece itself, on which the defendant meant to rely, to repel the charge of Atheism : especially as he offers the piece as a sort of profession of faith, and desires to tell the readers of the Trumpet in his own language, "what he did, and what he did not believe." It belongs to you, however, exclusively, to judge of the import of the piece. The general rule is, in such cases, to construe words according to their plain and natural meaning ; and where words are equivocal in their nature, they are to be construed most favorably for the party on trial.

After this avowal of what the defendant does not believe, it would seem to be a mere matter of curiosity to inquire what he does believe. Rejecting all religion, natural and revealed, and considering death as the extinction of being, nothing like religion seems to remain, in any sense of the word. What advantage has he over the beast that perisheth excepting the perfect consciousness of the miseries of this life, without the least consolation from the hope of a better ? This declaration of a man, who was once a minister of the gospel, has been published by him, and is now circulating in a newspaper for his profit, among thousands of the poor and laboring classes of this community. And I cannot omit to repeat, in this connection, the observation of the illustrious Erskine, in the trial of Thomas Williams, for publishing Paine's "Age of Reason," in the court of King's

Bench, before Lord Kenyon, in 1797.¹ "Of all human beings, he says, the poor stand most in need of the consolations of religion, and the country has the deepest stake in their enjoying it, not only from the protection which it owes to them, but *because no man can be expected to be faithful to the authority of man, who revolts against the government of God.*"

But the defendant claims the right to think as he pleases, and to publish his sentiments, which right is indeed secured to him by the laws of this commonwealth. His counsel has taken a wide range, and furnished ample quotations from controversial writings, ancient and modern, and even from celebrated writers of the present day, to justify the style of these extracts. If they are written according to the rules of disputation among the learned; if they are decent in their character, and published with the view to correct error, and to diffuse truth; he will not have offended against any law. If he has merely asserted his disbelief in all the popular notions of Christianity, without attempting, by impious and obscene remarks, to wound the feelings of the whole Christian community, he will not have committed an offence of which this court can take notice. But you are to consider, that the people of this commonwealth believe in the existence of a Supreme Being, in Jesus Christ, as the Saviour of the world, and in the Holy Spirit as the sanctifier and comforter of his people. In connection with faith in these articles, they believe, generally, in a future state of rewards and punishments, in the immortality of the soul, in a righteous final judgment, and in the essential relation between present virtue and future happiness. Great shades of difference undoubtedly exist in the opinions of the various Christian sects on these subjects.

In a court of justice, it is our duty to take notice of the existence in our commonwealth of this diversity of belief and sentiment. It is of no consequence, at this time, to what

¹ 26 Howell's State Trials, 654.

Commonwealth v. Kneeland.

denomination you or I belong. As for myself, I freely avow, that I am attached to the free institutions of my country, and bound to give to them all the support which they can derive from my feeble hands. But we are to execute the laws, as they are, according to their letter and spirit. The law regards the great multitude of religious sects, as standing on equal ground, and as having equal rights; and that no one has claim to preëminence over the others. No person may treat them with contumely and reproach. None may insult their religious feelings with indecent language. And none may disturb them in the performance of their religious rights. I know that there are some coarse minds, who think that there is no practical liberty where they have not the right freely to do wrong. But if, under the color of a rare liberty, an Atheist, or other impious person might insult Christians with impunity, the law would deny to their religion the protection which is stipulated in its favor by the constitution.

If the object of the defendant was to correct prevailing errors, you have a specimen of his style both of reasoning and illustration, in the first article, which is set forth in the indictment, and which the learned counsel, on both sides, have, from respect to modesty, omitted to repeat. It is one of those impure passages which deform the writings of Voltaire, bad enough in the original, still worse in the translation. It is a pity that the translator could not have selected from the writings of that illustrious genius, something friendly to virtue and literature, of which there is abundance, and that his vitiated taste should have fallen upon a passage which equally offends against modesty and religion. You will perceive that it refers to that article of belief among all Christians, with but few exceptions, that the conception of the blessed Saviour was miraculous, and not according to the course of nature. If he had meant to say that Jesus Christ was a mere man like ourselves, and that Joseph was his father, could he not have found language to express the sentiment with decency, without a disgusting ref-

erence to those parts of the human frame which nature has taken so much care to conceal, which even savages cover with the veil of natural modesty, and of which among the civilized it is always deemed indecent to speak? Had the writer been speaking in this passage of a common man, his language would have wounded the ear of purity. But he was speaking of him, whom so large a portion of the Christian church worship as one of the trinity of persons composing the Godhead, and whom all Christians reverence as the Saviour of the world; who was raised from the dead by the power of God, who now sitteth at the right hand of God, whence he will come to judge both the quick and the dead. It is for you to decide whether his language was fitting — whether it is not both obscene and impious.

One other article in the indictment remains for your consideration; and it will be for you to judge, whether the writer could have risen higher in the scale of impiety. It is that in which he speaks of prayer. It will be difficult, I think, to decide from reading the piece, whether it was the object of the writer to cast most ridicule upon the prayers of pious men, or upon God, the object of all prayer. But how perfectly harmless are wit and ridicule on such subjects! Prayer is the breath not of Christians only, but of the devout of all religions. It seems to be, from its universality, the voice of nature ascending from all intelligent beings to their common Creator. But the writer of this piece presumes, most irreverently, to call the Supreme Being, with a sneer, *the Old Gentleman*, and to compare him with a mortal man; to make him a subject of pity, assailed from all quarters, by day and by night, with contradictory petitions, which he can neither recollect nor grant. He represents him as obliged to keep a set of books and clerks, to record the various petitions, but unable to dictate to them what petitions to record. Thus he presumes to represent him, who pervades all things by his virtue, and governs all things by his providence, as such a weak, imperfect, and perplexed being as ourselves.

Commonwealth v. Boott.

If you believe that the defendant has published these things in his newspaper, unwittingly, not knowing the force of words, and devoid of an evil intent, — he will be entitled to your verdict of acquittal. But if you believe that he, well knowing the force of words, and intending to propagate the gloomy doctrines of Atheism, has, by this publication, blasphemed the holy name of God, and denied him — that he has reproached Jesus Christ, by representing his history as a fable, and his miracles as the tricks of an imposter — and that he has contumeliously reproached the Holy Scriptures — thus endeavoring, in his malignity, to disseminate his impious sentiments among the poor and ignorant, and to deprive them of the faith and hopes of religion, the sole consolation of the miserable, both in life and death, — you must find him guilty. Judge his cause with charity, but let your verdict be the voice of wisdom and truth.

The jury found the defendant guilty.¹

JUNE TERM, 1834.

COMMONWEALTH v. WILLIAM BOOTT.

Upon the trial of an indictment for carrying a challenge to a duel, the confessions and statements of the principal, tending to establish his guilt, made in the absence of the second, were *held* to be admissible.

Upon the trial of an indictment for “giving, sending, and delivering a challenge” to a duel as a second, evidence of a custom for a second to deliver a challenge was *held* to be inadmissible.

Upon the trial of an indictment for carrying a challenge to a duel as a second, evidence to show that the defendant was a friend to the principal in a previous difficulty with another person, was *held* to be inadmissible.

¹ Upon the trial of an appeal in this case in the supreme court, before Putnam, J., at the May term, 1834, the jury did not agree, standing eleven for conviction and one for acquittal. The defendant was again tried at the November term before Wilde, J., and convicted. The opinion of the full court, denying a motion for a new trial, is given in 20 Pick. 206. Morton, J. delivered a dissenting opinion. The defendant then suffered imprisonment for sixty days in the common jail.

Where, upon the trial of an indictment for carrying a challenge to a duel, in the county of Suffolk, fought in Rhode Island, it did not appear that there had been any trial for the offence in Rhode Island, nor what were the laws of that state in regard to the offence; it was *held*, that, for the purposes of the trial, Rhode Island was a foreign state, and that sending the challenge was, in itself, a substantive offence under the statute.

THE indictment in this case was founded upon the act of 1804, c. 123, Rev. St. c. 125, s. 7, and charged that Robert C. Hooper, on the 29th day of January, 1834, at Boston, did unlawfully and maliciously by a written message, provoke, excite, and challenge one Joseph S. Jones to fight a duel with him said Hooper, with dangerous weapons, to wit, with pistols,—no duel being or having been fought thereon within said commonwealth of Massachusetts; and that the said William Boott, on &c. at &c. did become, and then and there voluntarily and knowingly, was a second, agent and abettor of him the said Hooper, in the giving, sending, and delivering of the challenge and message aforesaid from the said Hooper to the said Jones, against the peace &c. and contrary to the form of the statute in such case made and provided. No question was made, whether the defendant could be tried as a second, in sending a challenge, before the conviction of the principal.

Rev. E. S. Gannett, a witness called for the government, testified as follows:—I am acquainted with Mr. Hooper; saw a portion of the correspondence; I heard him read some papers signed by himself, and some which were signed I cannot say whether by Mr. Jones or Captain McNeil; he did not read the signatures, they related to the difficulty which had taken place, not to a duel. He stated that a duel took place in consequence between himself and Mr. Jones. I never knew who were seconds except from public rumor; I never conversed with Mr. Boott; I had but one conversation with Mr. Hooper. *Cross-examined.*—I could not identify the papers he read; because I had seen some of them before, in others' hands, and I think it would be difficult for me to say which he read to me.

(Some papers were shown to the witness by the counsel for the defendant, and one letter was identified.) Mr. Boott was not present at that interview. I saw none of the correspondence in other hands. Mr. Hooper read me but a part. I saw no original letter, and I have no recollection of seeing any copy of a letter signed by Mr. Jones. I cannot swear that I saw any letter addressed to Mr. Jones.

Joseph H. Buckingham. I do not know that I know Mr. Robert C. Hooper; I have had two conversations with a gentleman whom I supposed to be Mr. Hooper; the first conversation was in a barber's shop, and we adjourned into my office; I am junior editor of the Courier. The conversation related to a duel.

Question. Did Mr. Hooper say he had fought a duel?

Objected to by the counsel for the defendant. Mr. Boott is not to be tried or convicted by the declarations of Mr. Hooper or any third party, when he (Mr. Boott) is not present.

The county attorney, in reply, cited Stark. on Ev. 51 — declarations of parties privy to the act are evidence — it is declarations of strangers only that are excluded. Also 2 vol. 4, article *Admissions*.

By the counsel for the defendant. So far from Mr. Boott being party or privy to Mr. Hooper's statements, the testimony which Mr. Buckingham is apparently about to make is a complete surprise. The case cited of a sheriff and deputy is not analogous; a sheriff is bound by the acts of his deputy; but is the deputy bound by the acts of the sheriff forever? A record binds the parties to that record, but it cannot affect third parties who have no control over or participation in the formation of that record. The privity of the principal and second, if there ever was any, ceases at the conclusion of the duel. (2 Russ. on Crimes, 1823.) Declarations of one party after an event, are not evidence against another party concerned, except in cases of conspiracy. (3 Stark. on Ev. 1304.)

THACHER, J. As the jury must be satisfied that a challenge

was sent by Robert C. Hooper, any evidence tending to prove his guilt is admissible, although he is not upon trial. Even if Robert C. Hooper had been tried and convicted of the principal offence, in which case the record of his conviction would be admissible evidence of that fact, upon this trial; it would yet be competent for the defendant to contest the fact of the guilt of the principal, and to offer evidence to prove his innocence.

Mr. Buckingham recalled. I left the barber's shop first, and he followed to my counting room. The gentleman in the shop came and handed me a paper which he wished me to read; I read it, put it into my pocket, and told him I would be in my office all the forenoon. He followed me to my office. The paper related to a duel, and I advised him to drop the matter; I presume he wished to have the paper published; it had no signature; he did not say who was the challenger. He said the duel was fought with a Mr. Jones. I do not remember whether the paper said that Mr. Jones was the person with whom he fought. I should not know the paper again. I saw it was a very improper one to publish and handed it back to him. I do not know Mr. Boott.

Cross-examined. The paper was not a correspondence; it was a statement of the facts which led to the duel. The duel he said was fought in Rhode Island.

William G. McNeil. I know Robert C. Hooper; never had any conversation with him about a duel fought in Rhode Island; I was not present at the duel; I do not personally know that Mr. Hooper challenged Mr. Jones; I do not recollect to have seen any correspondence between Mr. Jones and Mr. Hooper. I do not know who were the seconds, except from rumor; I have never had any conversation with Mr. Boott about any duel, nor about the challenge; I don't know that Mr. Boott was agent, second, or abettor in sending a challenge to Mr. Hooper.

Gen. H. A. S. Dearborn. I had a conversation with Mr. Hooper previous to the duel, and I understood from the conversation that he had challenged Mr Jones; I don't know that I

Commonwealth v. Boott.

ever spoke to Mr. Boott, until after the duel took place ; I saw him once after the duel, and that was accidentally in the street ; he then gave no information that he had been second, or carried the challenge, or had taken any steps in sending the challenge.

Question. Is it not usual that the person who acts as second, carries the challenge ? [This question was objected to.]

THACHER, J. Whatever is usual on such occasions, it might so happen, that, in this instance, if any challenge was given, it was not in writing, and that it had been carried by some one else. Whatever the defendant has done, whether within the county of Suffolk, or elsewhere, may be proved, but it will be necessary to prove some act done within that county, in order to bring the offence within the jurisdiction of the court. If the challenge was written within the county, and sent out of it, or if it was written out of the county, and sent into it, it will be sufficient to sustain the jurisdiction of the offence. Crimes are in their nature local, and if not proved to have been committed within the county where they are laid, the party accused is entitled to a verdict of acquittal. Where a misdemeanor consists of distinct facts, the whole can be tried in the county wherein any distinct part can be proved to have been done. It was said by Abbot, Ch. J., in pronouncing an opinion on this point, in the case of *Rex v. Sir Francis Burdett*, (4 Barn. & Ald. 180,) "I am clearly of opinion, that if any such part of an entire misdemeanor be proved to have been done in the county in which the indictment is preferred, there is enough to satisfy the locality of trial." In this case the charge against the defendant is for acting as second in the giving, sending, and delivering the challenge to Hooper. He is not on trial for acting as a second in fighting the duel. That act, having been done without the commonwealth, was not an offence against the law of this commonwealth. It ought to be shown that the defendant advised, dictated, wrote, or carried the challenge, or that he arranged the preliminaries of the meeting, which afterwards took place in Rhode Island, or that he procured the pistols, or did some

other act within this county, from which the charge in the indictment could be fairly inferred ; otherwise he must be acquitted. I cannot therefore permit the question to be answered.

Witness. I never saw Mr. Boott and Mr. Hooper together in my life.

Cross-examined. Mr. Hooper was at my house, when he told me he had challenged Mr. Jones ; it was one or two days before the duel took place ; my house is in Roxbury.

Dr. H. G. R. Dearborn. I know Mr. Hooper ; I understood from him that he had challenged Mr. Jones ; I don't know who carried the challenge ; don't know whether it was in writing ; I was not present when the battle was fought ; I went to Rhode Island about the time ; I did not go in company with any of the parties ; I returned with Mr. Boott and Mr. Hooper ; I joined them at the Half-way House in Walpole ; I believe they arrived there first ; I had no one with me from Rhode Island to that house but the driver ; and thence to Boston with Mr. Boott, Mr. Hooper and the driver in a four-wheeled carriage ; we took supper at the Half-way House, it being after dark ; they stated there had been an exchange of shots ; I remember nothing respecting loading the pistols ; I don't recollect that it was said in Boott's presence who fired first, or who gave the word of command ; I do not know who came with Mr. Hooper to that house, as I did not see them get out ; Mr. Boott got into the carriage with Mr. Hooper in town to go out. I knew something of the quarrel, but I had no conversation with Mr. Boott about it ; I once saw them together before the duel, there was some conversation about the duel ; he communicated no answer then from Mr. Jones ; I do not know who carried the message to Mr. Jones ; I don't remember that Mr. Boott ever said anything about carrying the challenge, or about the manner of fighting ; I conversed with Mr. Boott, and he told me that he thought it was probable a duel would take place ; I can't swear that Mr. Boott acted as the agent or friend of Mr. Hooper. When I met him in the street I thought he was then acting as

the friend of Mr. Hooper, but I cannot say upon what that inference was founded ; I can with great difficulty distinguish between general rumors and what I then heard ; I perhaps inferred it from seeing them together, and saw them leave the city together. I saw them also on the road ; I could not state the conversation in the street or on the road ; I was not consulted as to the propriety of any of their acts ; heard nothing about who carried the challenge ; I know of no other person who acted as Mr. Hooper's friend.

Cross-examined. Mr. Hooper and Mr. Boott did not get into the carriage together in Boston, but in Roxbury ; I heard no conversation on the road before the duel ; I referred to the conversation after the duel ; I did not accompany them at all to Providence ; I went to Providence with a letter to Mr. Boott ; I don't know what the letter was ; I did not receive it from Mr. Jones ; I met them at the Half-way House accidentally, and not by concert ; I never heard Mr. Boott say that he carried the challenge to Mr. Jones ; I don't know how long it was before the duel that I saw Messrs. Boott and Hooper in the street together. I do not know that the challenge was in writing ; I left Providence two or three hours after I arrived there to come home, and did not see these gentlemen on the road until I found them at the Half-way House. It was said that the exchange of shot took place in Rhode Island ; I have had a great deal of conversation out of doors about this matter ; I cannot, therefore, separate that easily from conversations I have had with any particular individual. The parties started from my father's house ; it was not expected that I should follow ; I was not the medical friend of either party ; Mr. Lyman handed me the letter ; I found Mr. Boott at the hotel ; I was with him five minutes ; did not see Mr. Hooper ; I did not see Mr. Boott in any other part of Rhode Island. I did not leave Roxbury until the second day after they left ; I did not know where they would fight ; I supposed they would fight. I did not know that they had pistols at my father's house. I don't think that Mr. Boott

provided Mr. Hooper with pistols ; I don't know whether they had pistols, powder and ball. Jones lived at the Tremont House. I do not know who his second was except from rumor.

Daniel Parkman. I do not know that Jones and Hooper fought a duel. Never had any conversation with Mr. Boott. Had a process against Hooper and Jones ; know nothing which implicates Mr. Boott.

Captain William A. Howard. Mr. Hooper admitted to me that he had fought a duel with Mr. Jones ; I know nothing about Mr. Boott. I saw the challenge ; it was written and signed by Mr. Hooper ; I saw Mr. Boott and Mr. Hooper together about this time. Have no recollection of any conversation between them about Mr. Jones ; I know nothing which Mr. Boott has said or done, which leads me to believe him to have been a second ; I think that Mr. Boott's name was not in the challenge ; I don't know who went on the ground with Mr. Hooper.

Question. Was Mr. Boott the friend of Mr. Hooper in a previous difficulty with Captain McNeil ?

[This question was objected to and ruled out.]

The challenge was in Mr. Hooper's possession, when I saw it ; I don't know that it was ever sent. I don't recollect that Mr. Hooper ever said that that challenge was sent. No other person was then present ; I saw Mr. Hooper and Mr. Boott together soon after, but I do not know that Mr. Boott ever saw that letter. The letter demanded an apology or the satisfaction due to a gentleman. I saw this letter at Mr. Hooper's room in the Tremont House. Mr. Hooper and Mr. Jones both resided at the Tremont House.

Cross-examined. There was nothing said provoking in that letter, and nothing about the weapons.

[The question of custom on such occasions was again asked and objected to, and again ruled out.]

Henry W. Sargent. I had some conversation with Mr. Hooper previous to the duel. I knew from him that he and

Commonwealth v. Boott.

Jones were about to fight. I know nothing from Mr. Boott. I did not see Mr. Boott from the Monday previous to the duel, which was on Friday, until day before yesterday.

Thomas K. Davis. I know Mr. William Boott and Mr. Jones ; I know nothing of this business, except what I know as professional adviser of Mr. Jones, and my interview with Mr. Boott was in consequence of this relation which I bore towards Mr. Jones. Mr. Boott was no client of mine ; I went to see him a week or ten days after the duel, having heard that Mr. Hooper had been very imprudent in his statements, and asked him to advise Mr. Hooper to be more prudent, as both were under heavy bonds to keep the peace. Mr. Boott concurred with me in opinion. We then went into general conversation upon the events of the duel. I remember he said a duel had been fought in Rhode Island. I understood from him that he was second to Hooper, and Gibbs second to Jones ; that the weapons were pistols, and that both parties fired. I do not remember that he said who were on the ground. He said nothing about the challenge. He said nothing about the previous arrangements. I think he said the word was given by Mr. Gibbs ; I never saw the challenge. I do not know who gave the challenge to Mr. Jones.

Charles P. Curtis, for the defendant contended,

1. That a duel was actually fought, and that the offence of Mr. Boott, if anything, was a greater one than that charged. On the subject of the merger of offences, he cited *Com. v. Kingsbury*, (5 Mass. 108.) The old act of 1784 against duelling, did not contain the same provisions as the statute 1804.

2. Neither of the acts has in it the phrase, "and no duel be fought thereon in the commonwealth of Massachusetts." The government assumes to prove that no duel was fought in Massachusetts, but that there was one fought in Rhode Island. As to the necessity of the government proving their negative averments, he cited 2 Russ. on Crimes, 769, (5th ed.)¹

¹ Vide *United States v. Hayward*, (2 Gal. 485) ; 8 Am. Jurist, 233.

Parker, for the commonwealth.

THACHER, J. Whether we regard the interest excited at the time, or the effect upon the parties under the law, it is a very important case as it regards the law of the land. It is undoubtedly an offence to carry a challenge. Still you must look into the evidence without favor or affection; there is no evidence introduced for the defendant, and he rests solely on the defects of evidence in the government. You must forget all that is said out of doors, and confine yourselves to the evidence before you. The indictment in the first place charges Robert C. Hooper with having committed the offence of sending a challenge in this county, and secondly, it charges the defendant as aiding and abetting him in that act. You must take no notice of offences in another county, or in another state. Both may be guilty, or Hooper may be guilty, and the defendant innocent. Are you satisfied that Hooper wrote such a challenge and caused it to be sent? Both Hooper and Jones lived in the same house, and in that house Hooper had in his possession a written challenge directed to Mr. Jones; and soon after the parties meet and exchange shots. You must first inquire if the offence of sending the challenge in this commonwealth is merged in the offence of fighting the duel in another state. But I consider the sending a challenge to fight, is a substantive offence, whether the duel is to be fought here or elsewhere. We know not whether fighting a duel in Rhode Island is an offence, probably it is; but it does not appear that the parties have been charged with the offence in Rhode Island. If they had been tried there, then the question would have become one of more consequence. They then would appear to have been tried as well for the act as for the preliminaries. To allow this objection to prevail, would be to instruct our citizens how to evade the laws. Satisfy yourselves, then, whether Hooper gave a challenge in this county; if he did, then so much of the indictment is proved.

But the defendant is charged not for Hooper's act, but for

Commonwealth v. Hooper.

his own. Are you, from the evidence, satisfied that the defendant in this county, acted as second and aid to Hooper? Was he seen in company with Hooper dictating, advising or carrying the challenge? Did he adjust the preliminaries, or procure the pistols? I cannot find one of these things proved. Dr. Dearborn says he saw them once together in the street. But they started together from General Dearborn's in Roxbury, and they were together in Providence; but you are to say if he did anything in this county. If you find him guilty, you will say that his agency commenced in a material respect in this county. It is a question of fact for you to settle; if you have doubts as to any of the points which must be proved to constitute the offence, they must operate in his favor, and then you must acquit him, otherwise you must find him guilty.

The jury returned a verdict of not guilty.

AUGUST TERM, 1834.

COMMONWEALTH v. ROBERT C. HOOPER.

In the trial of an indictment for sending a challenge to a duel, it was *held* to be sufficient for the government to prove that a written challenge had been sent, without producing the challenge.

In such case the government is not to be presumed to have the original challenge in its possession.

Upon the trial of an indictment, under the act of 1804, c. 123, for sending a challenge to a duel fought in Rhode Island, proof of an averment that the duel was not fought in the commonwealth, was *held* to be unnecessary.

THE indictment in this case, which was returned at the February term, 1834, was founded upon the act of 1804, c. 123, and contained but one count, in which the offence was described as follows: "The jurors for the commonwealth of Massachusetts on their oath present, that Robert C. Hooper, of Boston aforesaid, merchant, on the 29th day of January, A. D. 1834, at Boston aforesaid, with force and arms, being a person

of a malicious and revengeful disposition, and intending and designing one Joseph S. Jones, wilfully and maliciously, and of his malice aforethought to kill and murder, did unlawfully and maliciously by written message, provoke, excite, and challenge him the said Jones to fight a duel with him said Hooper, with dangerous weapons, to wit, with pistols; and that he, the said Robert C. Hooper, a certain challenge, in the name of him the said Hooper, and in the form of a written message to him the said Jones directed, exciting and provoking him the said Jones to fight a duel with the said Hooper, did then and there wilfully and maliciously write, and direct and cause to be written and directed, which said challenge and written message was then and there concealed and destroyed by the said Robert C. Hooper, or some other person, to the jurors aforesaid unknown, so that they cannot set forth the tenor or the substance thereof, and that he the said Robert C. Hooper, the said written message did then and there wilfully and maliciously send and deliver, and cause and procure to be sent and delivered to said Jones, no duel being or having been fought thereon within said commonwealth of Massachusetts, against the peace of said commonwealth, and contrary to the form of the statute in such cases made and provided."

Captain W. A. Howard, a witness for the government, testified that he was in the defendant's room at the Tremont House, and the defendant showed him a letter, which he had written to be sent to Jones; the witness saw at the same time several other letters, but only one addressed to Jones; — this was a call on Jones for an apology for an insult offered by him to the defendant on a former occasion; the witness advised the defendant to alter some of the expressions which he thought too severe, and the defendant did so; the witness did not know that the defendant had sent a challenge to Jones, and had not heard the defendant say that he had done so. On being asked if he did not testify, on the trial of William Boott, that he had seen a written challenge from Hooper to Mr. Jones, he said he might

Commonwealth v. Hooper.

have said so, but he had confounded the correspondence between the defendant and Captain McNeil with that between the defendant and Mr. Jones. On cross-examination, he recognized the paper which the defendant had shown him, on which was written the letter to Jones, which was afterwards cancelled, and underneath it the original draft of the letter which was subsequently sent. The letter was in these words :

“ Tremont House, Tuesday morning.

“ Having terminated my affair with Captain McNeil, I now offer you an opportunity of apologizing to me for your expressions and conduct on Saturday evening.”

It was subscribed by the defendant and addressed to Mr. Jones.

Henry W. Sargent, Esq. also produced as a witness for the government, testified that about three o'clock, on the day when the above letter was sent, he saw the defendant get into a coach to go to Charlestown, and the defendant stated to him that he did so to avoid breaking the peace of this county or state, (the witness did not recollect which.) He said, too, that the defendant told him that Jones had agreed to fight him or to meet him, he could not recollect which.

The attorney for the commonwealth then put in a written statement of the testimony of four witnesses, from the minutes taken at the trial of Boott, all of whom were either permanently or temporarily absent from the commonwealth, and whose testimony was admitted by the defendant. This paper was as follows :

“ MUNICIPAL COURT, AUGUST TERM, 1834.

Commonwealth v. Robert C. Hooper.

I admit, for the purposes of this trial, that the following persons, if sworn as witnesses, would testify as follows : the Rev. *Ezra S. Gannett*, that he is acquainted with the defendant, and had a conversation with him — had only a short conversation — the defendant read to him a portion of a correspondence and some papers signed by himself, and some which were signed by Captain McNeil or Mr. Jones, but he cannot say which — that, he the witness, did not read the signatures — these papers re-

lated to a difficulty which had taken place, not to a duel. The defendant stated that a duel had taken place between himself and Mr. Jones — the witness has no recollection of seeing any paper signed by Mr. Jones, and cannot swear that he saw any letter addressed to Mr. Jones — the witness identifies one of the letters in a packet of letters shown to him by the defendant's counsel. — *Joseph H. Buckingham* : — That he had two conversations with a gentleman whom he supposes to be defendant, R. C. Hooper ; the first was in the barber's shop, from which they adjourned to witness' office — the conversation related to a duel — the defendant handed him a paper which he wished witness to read ; he read it and put it in his pocket ; the paper related to a duel, and witness advised him to drop the matter ; it had no signature. Defendant did not say who was the challenger. He said that the duel was fought with a Mr. Jones. Witness does not remember whether the paper said that Mr. Jones was the person with whom defendant fought. It was a statement of facts, not a correspondence. It said the duel was fought in Rhode Island. — *Henry A. S. Dearborn*, had a conversation at his house in Roxbury with defendant, previous to the duel ; understood from it that he had challenged Mr. Jones. — *Henry G. R. Dearborn*, understood from defendant that the defendant had challenged Mr. Jones. Does not know whether the challenge was in writing ; went to Rhode Island about the same time, but was not present at the duel, and did not go in company with any of the parties ; joined the defendant and Mr. Boott at the Half-way House, Walpole, on their return — believes they arrived there first — returned to Boston with them. Witness met them at the Half-way House accidentally, not by concert. It was said that shots had been exchanged in Rhode Island. Witness had had a great deal of conversation out of doors about this affair, and cannot easily separate that from conversations he may have had with any particular individual ; the defendant started for Providence from General Dearborn's house in Roxbury. Witness set off for Providence the second day afterwards."

Commonwealth v. Hooper.

The counsel for the defendant, in stating the defence, contended that the government must prove, 1, that the challenge was in writing; 2, that it was in the possession of the defendant, who had been required to produce it at the trial, or that it had been by him destroyed; and 3, that no duel had been fought within this commonwealth. (2 Russ. on Crimes, 674-676; 1 Stark. on C. P. 219.) As to the criminal intent, he quoted 2 Russ. on Crimes, 275. He read in evidence a certified copy of the law of Rhode Island against duelling. It was authenticated by the signature of the secretary, and was under the seal of the state.

Parker, for the commonwealth.

C. P. Curtis, for the defendant.

THACHER, J., charged the jury substantially as follows: You will consider the case on trial, without regard to public reports, or to anything which you have heard or read before the trial. You are to render your verdict not according to a general and undefined belief of what may have been done, but upon the law and evidence. Upon the general subject of duelling, it is sufficient to add to what has been already said with so much ability, that whoever takes the life of another in a duel, voluntarily engaged in, whether he gave or received the challenge, and under whatever circumstances of provocation, is deemed in law guilty of murder, unless the duel was fought under such circumstances, immediately following the provocation, that it might be considered a homicide in heat of blood, upon a sudden falling out between the parties, which might reduce the offence to manslaughter. The indictment is founded on the following clause in the sixth section of the act of 1804, c. 123, "If any person shall by word, message, or in any other manner challenge another to fight in a duel, as aforesaid, when no duel shall be fought thereon, he shall be punished as a felonious assaulter," &c. To understand the nature of the offence and the meaning of the phrase *as aforesaid*, we must recur to the

preceding clause of the section. "If any person shall voluntarily engage in a duel with rapier or small sword, back sword, pistol, or other dangerous weapon, to the hazard of life, when no homicide shall ensue thereon." The challenge must be to fight with a dangerous weapon to the hazard of life. A challenge to fight a boxing match with fists, would not be within the statute, because it would not be considered a deadly encounter with a dangerous weapon. The challenge may be given by word, or by a verbal message communicated by a friend of the challenger; or it may be in writing, delivered by the party himself, or sent by a third person; or it may be given in any other manner, by which it may be understood that one challenges or provokes another to a deadly contest. The offence may be described in all these ways, or in any of them, according to the fact; but as that may be uncertain, it may be described in each of these ways in separate counts, so as to meet the evidence at the trial in any aspect in which it may then appear.

The legislature can punish only those violations of the peace, which are committed within its own jurisdiction. Whatever crime is done in another state is against the law of that state, and punishable there only. But high treason may be committed out of the limits of the commonwealth. It consists in levying war against the state to which we owe allegiance, and from which we are entitled to claim protection. This may be done by a citizen within its territories, or by joining himself to its enemies, and committing acts of hostility against his own country. The challenge to fight in a duel must be given within this commonwealth. The law does not say where it is to be fought, and therefore I consider that it is not material whether it is to be fought within our own commonwealth, or within a foreign state. If a duel is fought upon such challenge within the commonwealth, the offence of sending the challenge is merged in the act of fighting the duel, both acts being committed against our own law. But where no duel is fought within the com-

Commonwealth v. Hooper.

monwealth, no offence is committed against our law, but that of sending the challenge. If the duel is fought out of the commonwealth, then, as our peace is not violated by that act, there is nothing in which the offence of sending the challenge can merge. It would not be reasonable to say that no offence has been committed against our laws, because a greater offence has been committed against the laws of another state. The laws of both are violated, and each may exact the penalty, when the offender can be found within its limits. It is a mere act of discretion, whether the state will punish the offender for the minor offence, committed within its own limits, after he has suffered perhaps an adequate punishment for the greater offence, committed within the limits of the foreign state.

These being the general principles of law, we are next to look at the indictment which contains a description of the offence. In describing an offence against a statute, it is necessary to bring it within the letter of the statute. But that the party accused may be enabled to prepare for his defence, it is always necessary to show the manner in which an unlawful act was done, as well as the time when, and the place where it was done. The verdict of the jury is to be composed of what is alleged and what is proved; and to establish the guilt of the accused, the proof must, in every material respect, support the allegations. In this indictment there seems to be a double description of the offence, one of which is nearly in the words of the law, and is undoubtedly sufficient. It is in these words: "that R. C. H., on &c. at &c. intending to kill and murder one J. S. J., did unlawfully and maliciously, by written message, challenge the said J. S. J. to fight a duel with him said H. with dangerous weapons, to wit, with pistols; no duel being or having been fought thereon, against the peace, and contrary to the form of the statute," &c. But for the sake of a more full, and as it was undoubtedly deemed by the learned and faithful attorney of the government, by whom it was drawn, a more accurate description of the offence, the indictment goes on from

the word "pistols" to repeat the allegation relative to the challenge, and adds "and that he the said R. C. H. a certain challenge, in the name of him the said H. and in the form of a written message to him the said J. directed, exciting and provoking him the said J. to fight a duel with the said H. did then and there wilfully and maliciously write and direct and cause to be written and directed, which said challenge and written message was then and there concealed and destroyed by the said R. C. H. or some other person, to the jurors aforesaid unknown, so that they cannot set forth the tenor or the substance thereof, and that he the said R. C. H. the said written message did then and there wilfully and maliciously send and deliver, and cause and procure to be sent and delivered to said J., no duel being or having been fought thereon within said commonwealth of Massachusetts," against the peace &c. and contrary to the form of the statute.

If you are satisfied, from the evidence, that a written message was sent by the party to H. within this county, you will be authorized to find a general verdict of guilty, although the written message is not produced, nor evidence given of its destruction, and notwithstanding it shall appear that the duel was fought within the limits of a foreign state. The government is not presumed to have the original challenge in its possession, and it seems to account sufficiently for its non-production, that all the parties concerned, principals and seconds, are indicted for the offence. Where the offence consists in making the paper itself, as in forgery of an instrument, the written paper should be produced, or its absence accounted for. Because, whether it was a deed or a note, whether it was within the statute or at common law, and whether genuine or counterfeit, may be important questions at the trial. A challenge may be verbal or written; the offence consists in sending the message, not in the form in which it is sent. By averring that a challenge was in writing, the government make that fact material to be proved; but the express language is not necessary; it will be sufficient

to prove the substance of the message, and that the party sent it. Because it will be equally an offence, whether it was in words or in writing. It was wholly unnecessary to aver that no duel was fought within the commonwealth. Because the offence was committed by sending the challenge, and the legislature have not undertaken in this act, to prescribe a punishment for any offence committed without the limits of this commonwealth. The expression "within said commonwealth of Massachusetts" is not in the statute, but is inserted by the grand jury in the indictment, as the construction which they gave to the phrase, "no duel being or having been fought thereon." The indictment would have been sufficient without it, and it was therefore unnecessary to be inserted, and need not be proved. For allegations which are not essential to constitute the offence, and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof, and may be rejected as surplusage.¹

The government is not bound in this case to prove that no duel was fought within this commonwealth. In indictments founded on statutes, if there be any exception contained in the same clause of the act which creates the offence, the indictment must show negatively, that the defendant or the subject of the indictment does not come within the exception. If however the exception or proviso be in a subsequent clause or statute, or, although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defence for the party, and need not be negatived in the pleading.²

In indictments upon statutes, where an exception or proviso is mixed up with the description of the offence, in the same clause of the statute, the indictment must then show negatively, that the party, or the matter pleaded, does not come within the meaning of such exception or proviso. These negative

¹ Archbold's P. in C. C. 16, 19, 67.

² *Ib.*

averments seem formerly to have been proved in all cases by the prosecutor : but the correct rule upon the subject seems to be, that in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defence ; that is, the defendant must prove those facts from which the jury must infer the negative matter. But on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative.

But as this court cannot take cognizance of any offence which is not committed within the limits of the county of Suffolk, it is essential that it should be proved, that the challenge was sent within this county. If, however, any material fact constituting that offence was done here, it will be sufficient. " For, all matters of crime are so local, that if it be not proved to be done in the county where it is laid, the party accused is as innocent as if he never had done the thing.¹"

It appears in evidence, and was admitted by the counsel on both sides, that the duel was fought within the state of Rhode Island, and also that Hooper gave the challenge. But it does not appear by any direct evidence, where the challenge was given, nor whether it was verbal or in writing. It is for you to say, whether such circumstances appear, as satisfy you that a written challenge was sent within this county. If the challenge was written here and sent to another county, or if it was written elsewhere and sent into this county by the defendant, it will be sufficient. The burden is upon the government to prove the fact. Because the duel was fought in Rhode Island by two

¹ Mr. Sommers, in the Trial of the Seven Bishops, 12 State Trials, 318.

Commonwealth v. Moor.

persons residing in Boston, it by no means follows that the challenge was sent within this county. Nor, because it is assumed that the fact is known to the defendant, is he required to show where the challenge was sent; because a man may rest on his own presumed innocence, and no man is bound to accuse or give evidence against himself, nor ever to give evidence in denial or extenuation of a fact charged against himself, until the prosecutor has made out a probable case of guilt.

The jury returned a verdict that the defendant was not guilty in manner and form as set forth in the indictment, and he was thereupon discharged.

OCTOBER TERM, 1834.

COMMONWEALTH v. LUKE W. MOOR.

In the trial of an indictment, under the act of 1815, c. 143, for obtaining goods by false pretences from a mercantile firm, pretences proved to have been made to one partner were *held* to sustain the indictment.

Where, in the trial of an indictment for obtaining goods by false pretences, the jury returned "that the prisoner was guilty of unlawfully and fraudulently obtaining goods under false pretences," and the foreman stated that the jury could not agree on the fact of the intent; the court ordered a new trial.

THE defendant was indicted upon the act of 1815, c. 143, for cheating Messrs. Taylor, Reed & Co. of Boston, of merchandise, amounting in value to the sum of three hundred and eighty-eight dollars, by false pretences. The offence was alleged to have been committed on the 12th day of August, 1833. The indictment was found at the last August term of the court. The defendant was brought from Sharon, in New Hampshire, under an executive warrant, and the trial came on, by appointment, on Saturday, the 11th day of October. It was satisfactorily proved, that he made the pretences which were

set forth in the indictment, that they were false, and that the goods were delivered to him by Taylor, Reed & Co., under the belief that they were true. It appeared, that the pretences were made to Joseph W. Taylor, one of the firm only, whereas it was alleged in the indictment, that they were made to Taylor, Reed & Co. The prisoner was permitted to introduce evidence to prove that his intentions were fair.

Farley, of Groton, for the prisoner, contended that the jury could not lawfully find the prisoner guilty, unless they were satisfied that he used the pretences to all the partners as well as to Taylor.

Parker, for the commonwealth.

THACHER, J. instructed the jury, that evidence showing that the prisoner used these false pretences to one, was sufficient to sustain the averment in the indictment. Each of the partners represented the firm, and acted for it. The partners were all bound by the act of any one of them, and were all cheated of the goods. The injury was done to all and not to any one of them separately. Whatever was stated to one of the partners, was therefore in consideration of law, stated to all. He further instructed the jury, that if they believed that the prisoner made use of the pretences, that the same were false, and that the goods would not have been delivered to him, but in faith that they were true; it would follow as a conclusion of law, that the prisoner made use of them with intent to defraud — unless he could, on his part, rebut the legal inference by proof, that it was in his power at the time, and that he reasonably expected to be able to pay for the goods, notwithstanding the false pretences which he used.

The jury found the defendant guilty, and he was sentenced to hard labor in the state prison for three years.

The same defendant was tried, at the same term, upon another indictment, for a like offence, in cheating J. Vincent

Commonwealth v. Aglar and another.

Brown and William Lang of a quantity of goods to the value of two hundred and seventy-eight dollars and ninety-six cents. After a full trial, in which the prisoner was defended by Mr. *Farley*, the jury returned a verdict "that the prisoner was guilty of unlawfully and fraudulently obtaining goods under false pretences." Upon inquiry, the foreman stated, that they could not agree upon the fact of intent. The attorney for the commonwealth, moved for judgment against the prisoner, as upon a verdict of conviction. But considering, that the jury had negatived, or rather, that they had not agreed upon the intent to defraud, the court was of opinion that the verdict did not cover the indictment, but was defective in regard to a material fact. If the words of the verdict had been, that the jury "found the defendant guilty of obtaining the goods unlawfully and fraudulently under false pretences in manner and form as set forth in the indictment," it would have authorized a judgment as upon a verdict of guilty. But when it was expressly stated, that the jury could not agree on the fact of intent, it would be contrary to good sense for the court to make an inference in law, which the jury had refused to make in fact. The verdict was set aside, and a new trial ordered.

JANUARY TERM, 1835.

COMMONWEALTH v. FRANCIS AGLAR AND RALPH HUNTINGTON.

Under the act of 1813, c. 68, against illegal voting, a person, to come within the statute, must know, at the time of his voting, that he is not a qualified voter, and that he is doing or attempting to do an unlawful act.

To constitute a wilful aider and abettor in such an offence under the act, he must know at the time, that the principal was an unqualified voter, and had no right to vote; and with such knowledge, he must have said or done something designed and calculated to encourage him to vote.

Commonwealth v. Aglar and another.

Knowledge is not to be presumed in such case, but is to be alleged and proved like any other fact.

If a foreigner honestly believes, at the time of voting, that he has a right to vote, it is not a wilful act within the statute.

So, if the aider and abettor honestly believes that the foreigner had a right to vote, he is entitled to an acquittal.

Although the name of an unqualified person may be borne on the list by mistake, it will not authorize him to vote.

The name on the list will justify the inspectors to receive his vote. But if they refuse to receive the vote of an unqualified person, although it is borne on the list, it would be no injury to him, nor just ground of complaint.

THE prosecution grew out of circumstances, which occurred on the second Monday of November, 1834, at the ward-room of ward No. 9, in the city of Boston, during the election for governor, lieutenant governor, counsellors and senators, and representatives to the general court of this commonwealth, and for a representative to congress from district No. 1. The election was one of unusual interest. The case excited much interest also among the different parties, whigs, tories, Jackson men and antimasons. The counsel for the defence cited the answer of the justices of the supreme judicial court to a certain question proposed to them by the senate as to the qualification of voters, (11 Pick. R. 538; *Lincoln v. Hapgood*, 11 Mass. R. 350.) Also the answer of the justices of the supreme judicial court to certain questions proposed by the house of representatives, as to ratable polls, (7 Mass. R. 523.) And they relied much on the opinion of Chief Justice Shaw, in the case of *Capen v. Foster*, (12 Pick. 485.) The defence of Aglar was rested on the ground, that he acted innocently and under a mistake of right — that of Huntington, that he assisted Aglar, and encouraged him to vote, finding his name on the list of qualified voters, and supposing that was conclusive evidence of his right. The points of law and the substance of the evidence, will appear in the following instructions from the court to the jury.

Parker, for the commonwealth.

Hallett, *James* and *Park*, for the defendants.

Commonwealth v. Aglar and another.

THACHER, J. The defendants are on trial for several violations of the law of 1813, c. 68, which was intended effectually to secure to the people of this commonwealth the rights of suffrage. The accusation against Francis Aglar is, that he knowingly, designedly, wilfully, and fraudulently attempted to vote, and give in a ballot of persons voted for, at the election of a representative to the congress of the United States from the first district, and for governor, lieutenant governor, counsellors and senators, and for representatives to the general court of this commonwealth, on the second Monday of November, 1834, in the city of Boston, said Aglar being an alien born, and not having been naturalized, and so not having a right to vote at that election and well knowing himself not to be legally qualified to vote at said meeting. The charge against Ralph Huntington is contained in the same indictment, and accuses him of the offence of wilfully aiding and abetting the said Francis Aglar in attempting so to vote illegally as aforesaid. As the case relates to the freedom and purity of elections, the court has deemed it important, and has not felt disposed to restrain the counsel in the examination of witnesses, or in their arguments.

The indictment is founded on the third section of the act of 1813, c. 68, which is in these words: — "If any person, knowing himself to be not legally qualified to vote at any meeting for the choice of governor, lieutenant governor, senators and counsellors, representatives to the general court, or representatives to congress, shall wilfully give in, or attempt to give in a vote or ballot for any of the same then voted for, at any such meeting, every person so offending, shall forfeit and pay a fine therefor not exceeding the sum of fifty dollars; and any person who shall wilfully aid or abet any person, not legally qualified as aforesaid, in voting or attempting to vote, contrary to the provisions of this act, shall forfeit and pay a fine not exceeding thirty dollars for each and every such offence." Upon you rests the responsibility of the verdict, and that you may correctly perform your duty, you should understand the nature of the

Commonwealth v. Aglar and another.

offence. The party voting or attempting to vote, must know at the time, that he is not a qualified voter, and that he is doing or attempting to do an unlawful act. If he voluntarily gives in a vote, or attempts to vote, with this knowledge at the time, his offence is consummated; it is done wilfully, and he incurs the penalty.¹ To constitute a wilful aider and abettor in such an act, he too must know at the time, that the person was an unqualified voter, and had no right to vote; and with such full knowledge he must have done or said something, which, in the opinion of the jury, was designed and calculated to encourage the party to vote, or to attempt to vote. If the person charged as an abettor should honestly, though erroneously believe at the time, that the party voting or attempting to vote, had a right to do so, he will not be within the statute. For the offence both of the principal and the abettor is made by the statute to consist in having the guilty knowledge of the lack of legal qualifications, and the wilful intent to do the unlawful act. Therefore it is, that knowledge is not to be presumed in such case, but is to be alleged and proved like any other fact. To make a person guilty of harboring a traitor or a felon, he must have at the time a full knowledge that the treason or felony has been committed. Without this knowledge, no guilt can possibly be imputed to an individual who shall extend to the traitor or felon the common offices of humanity.

I consider that a free people ought to be jealous of their rights. It is the only way to preserve them. Foreigners not naturalized, who shall presume to intrude into elections should be indignantly resisted. For the sovereign power actually resides in the people. They elect their rulers to administer the government according to the constitution. When an alien not naturalized presumes to vote in an election of our rulers, it is a wrong done to every citizen. It is the nature, perhaps the

¹ "By wilful," says Wilson J. (1 East's Rep. 563, note a,) "I understand contrary to a man's conviction."

Commonwealth v. Aglar and another.

life of free governments to generate parties. But when a foreigner, or other unqualified voter, gives in a ballot at an election, it is a wrong to the voters of every party, without reference to the candidate for whom he votes. If one party should, by such means, gain an unlawful victory at one election, their antagonists will perhaps prevail by like means at the next. The state will become corrupt, and gradually lose its free character. Elections will come to be decided by illegal votes, and the people will in time find themselves governed by rulers not of their choice. I say, therefore, that it is a common injury; and I hope that, while any virtue remains in the people, they will be watchful over each other, and so preserve the foundation of the free body politic. If any citizen should become so recreant to duty, and to the principles of a free government, as wilfully to aid and abet foreigners in attempting to vote in our elections, before they shall have been naturalized, he ought to be made to suffer the penalty of the law. But I am bound to add, that there has been, I believe, a neglect of caution in times past, which may have led many well disposed foreigners to consider themselves legal voters, when they were not in fact entitled to that privilege. Having resided here for years, and paid taxes; finding also their names on the list of voters, they have been permitted to vote and serve as jurors without distrusting their own right, or having it questioned by others. But until an alien has been naturalized, he is not a citizen; and is not entitled either to vote in an election of rulers, or to serve on a jury. The payment of taxes is in return for the protection of the government. Neither length of residence nor payment of taxes will constitute citizenship. If he was not born in the country, or if born abroad, if his parents were not citizens of the United States, not having renounced or forfeited their allegiance, he is a foreigner, and he must conform to the laws which regulate naturalization, before he can hold real estate, or exercise the freedom of election, as a citizen of the country.

It follows from these views of the law, that if a foreigner

who has not been naturalized, should vote in an election, his vote not being legal; yet if he honestly believed at the time, that he had a right to vote, it would not amount to that wilful act which is forbidden in the statute. And so also if a person should aid and abet such foreigner in attempting to vote; if it should appear to the jury, that he honestly believed, that the foreigner had a right to vote, they ought to acquit him of the offence. Whether a person is a qualified voter, is a question compounded of law and fact. Those who prepare the lists may inadvertently err in their judgment, and lead others into error. If an alien, having resided in the country for many years, and finding his name on the list of voters, should use the privilege without question; it would be for the jury to consider, whether he might not naturally be led to believe that he was a qualified voter. But if presenting himself at the polls, and being interrogated, he should falsely assert, that he had conformed to the laws of naturalization; a jury might reasonably infer from that falsehood, that he knew at the time that he was not a legally qualified voter. Even a citizen may be ignorant of the law, and may innocently believe, that if the mayor and aldermen have placed the name of a person on the list of voters, it is conclusive evidence of his right, not to be questioned by the ward officers. Whether such citizen acted wilfully, in aiding and encouraging an unqualified alien to vote or to attempt to vote, must be decided by the jury under all the circumstances of the case.

It has been argued, that the ward inspectors in this city may not question the right of one whose name is borne on the list of qualified voters, nor refuse to receive his vote. On this point I have been requested to state my view of the law. No person, although a qualified voter, is permitted to vote at an election, unless his name is borne on the list. Although the name of an unqualified voter may be borne on the list by mistake, it will not authorize *him* to vote — he would do so at his peril. The name on the list will justify the inspectors to receive his

vote, because it is not declared to be their duty to institute an inquiry. They may, however, lawfully refuse the vote of one who is not a legal voter, though his name is borne on the list, when that fact has come to their knowledge, by the confession of the individual himself, or otherwise. In refusing to receive an illegal vote from an unqualified person, they do no injury to him — they prevent fraud — and they perform a meritorious act to the public, since it tends to keep elections pure, and to perpetuate our government and law in pristine health and vigor. It is part of the ministerial office of the inspectors, to prevent “all frauds and mistakes in elections,” and to place a check against the name of each voter. In refusing the vote of one whose name is on the list, they would act upon their own risk, and would undoubtedly be liable to the action of the party, if he was a legal voter; just as the mayor and aldermen would be liable to the action of a qualified citizen, whose name they should wrongfully refuse to insert on the list, whereby he should lose his privilege. Still, if the party had no right to vote at the time, he would sustain no wrong in either case, and therefore he would be entitled to no redress.

The first fact to be settled by you is, whether Francis Aglar wilfully attempted to give in a vote at the election held on the 2d Monday of November, 1834. If they should not be satisfied that he made this attempt, he must be acquitted; and it will then follow, that Ralph Huntington must be acquitted also, because his offence is charged as accessory to that of Aglar. But it may be, that Aglar did attempt to vote at that meeting, in which case it will be necessary for the jury to inquire further, whether it was done wilfully, he having at the time the knowledge that he was not a qualified voter. If they are not satisfied that he acted wilfully, he must be acquitted. But even if Aglar should be acquitted for this cause, if he made the attempt to vote through the wilful persuasion of Huntington, knowing at the time that Aglar was not qualified to vote, then, though Aglar should be acquitted, it would be the duty of the jury to

find Huntington guilty. It would amount to a substantive offence in Huntington: and it is not necessary, like the case of an accessory in the commission of a felony at common law, that the conviction of the principal should precede that of the accessory. Therefore, if Aglar did not attempt to vote, Huntington must also be acquitted, whatever feeling or zeal he may have manifested at the time. If Huntington advised Aglar to vote, and promised to stand by him in case he would vote; still, if Aglar did nothing in consequence of this advice and tender of protection, the offence was not consummated. It is not made an offence under this statute to advise an unqualified voter to give in a ballot, not even if such advice is accompanied with an offer of protection. It may have been very improper, and contrary to the duty of a good citizen, to give such advice to an unqualified voter: but that is not declared to be an offence, and that is not the charge for which Huntington is on trial.

It does not appear, that there was any previous concert between Aglar and Huntington — they were strangers to each other — all occurred in the ward room, during the heat of the election. Aglar came to the polls, with a vote in his hand, undoubtedly intending to vote. As soon as he appeared, and before he tendered his vote, one of the inspectors asked him, whether he was a naturalized citizen. He immediately answered that he was not. He was then told that an alien not naturalized, was not a legal voter, and that if he voted, it would be at his peril. He said he had been in the country for twenty-four years, had paid taxes, his name was on the list of qualified voters, and that he had voted at former elections without question. He was told by the inspectors that his name was indeed on the list, and that they would receive his vote; but that if he was not a naturalized citizen, he would be liable to prosecution.

While this conversation was proceeding, Huntington came forward, and having learnt that Aglar's name was on the list, insisted that that was conclusive evidence of his right and qualifica-

Commonwealth v. Goddard.

tion, and urged him to vote, promising at the time to hold him harmless from the consequences. Aglar said, that if he was entitled to vote, he should be glad to do so ; but if he was not authorized, he would not vote. After a very animated contest, in which the inspectors offered the ballot box to Aglar to receive his vote, but without any attempt on his part to give it in, he and Huntington left the room, in order to obtain legal advice on the subject. They went to Samuel Dexter, Esq., and from him to Andrew Dunlap, Esq., by whom they were advised, that an alien not naturalized could not lawfully vote at that election. Aglar did not return to the polls, but Huntington came back, asked the names of the inspectors, and threatened to institute a prosecution against them for refusing the vote. The warmth on both sides led to further inquiry and resulted in this prosecution. It is not politic to attempt to restrain by severe regulation the freedom of elections. It is well, that the people should be alive on these occasions. It is proof that they love their country, and take an interest in the government. Apathy is the worst state into which a free people can fall. All parties should stand for their rights. Errors committed by individuals in the fervor of the moment ought not to be severely criticised. But it is for the best interests of the people, that wilful violations of the law should be punished.

The jury returned a verdict of acquittal.

FEBRUARY TERM, 1835.

COMMONWEALTH v. NATHANIEL GODDARD.

The statute of 1817, c. 50, providing for the recovery of fines under by-laws of the city of Boston, is constitutional.

The statutes of 1786, c. 81, and 1796, c. 58, (Rev. St. c. 25,) relating to highways, do not apply to the city of Boston.

Commonwealth v. Goddard.

The by-law of the city of Boston, of August, 1833, making it the duty of the occupants of buildings to remove the snow from the sidewalks adjacent to them, is not in the nature of a tax upon property, and therefore not contrary to the fifteenth section of the city charter; and is not repugnant to the special laws relating to the streets of the city.

Under the statute of 1803, c. 111, which annexed a part of Dorchester to Boston, under the name of South Boston, the inhabitants of South Boston were properly exempted from the operation of such by-law.

The statute of 1833, c. 128, empowering the surveyors of highways in the city of Boston to regulate the width and height of sidewalks, repealed no prior statute.

THE trial in this case was upon an appeal from the judgment of the police court of the city of Boston, rendered on the complaint of Benjamin Pollard, city marshal, against Nathaniel Goddard, setting forth, that said Goddard was on the 30th day of December, A. D. 1834, the occupant of a certain lot of land and building on Summer and Kingston streets, in the city of Boston, and not being in that part of the city called South Boston, to which lot of land and building there is a footway and sidewalk; and that on said 30th day of December, there was a fall of snow on said footway and sidewalk; and that within six hours after the ceasing to fall of said snow, in the day time of the 1st day of January, A. D. 1835, the said Goddard did not cause the snow to be removed from the said footway or sidewalk, contrary to the peace of said commonwealth, the form of the statute of said commonwealth, and by-law of the city in such case made and provided. There was a second count in which Kingston street was described as a street of the city, and not in that part of the city which is called South Boston, and in which the offence was substantially described as in the first. At the trial, on the 7th day of February, the parties agreed that the facts alleged in the complaint were true; and that the defendant owned and occupied an estate bordering on Summer street ninety-one feet, on Kingston street three hundred and twenty feet, and on Bedford street one hundred and eighteen feet, or thereabouts; also, that the sides of Kingston street were

parallel, that the sidewalk thereon, adjacent to the premises of the defendant, is more than one sixth as broad as the whole street, and that the street was constructed before March, A. D. 1833.

In support of the complaint, the attorney for the commonwealth offered to read the seventeenth section of an ordinance of the city of Boston, passed the 22d day of August, A. D. 1833, entitled "an ordinance establishing the office of superintendant of streets, and prescribing the duties thereof; to prevent unlawful and injurious practices in the streets of the city, and in relation to sidewalks." The defendant's counsel objected to the reading of this ordinance to the jury; but the court overruled the objection, and it was read in these words, namely: "that from and after the passing of this ordinance, the tenant, occupant, and in case there shall be no tenant, the owner of any building or lot of land bordering on any street, lane, court, or public place within the city, (excepting that part of the city called South Boston,) where there is any footway or sidewalk, shall, after the ceasing to fall of any snow, if in the day-time, within six hours, and if in the night time, before two of the clock in the afternoon succeeding, cause the same to be removed therefrom; and in default thereof shall forfeit and pay a sum not less than one dollar, and not more than four dollars, for each and every day that the same shall afterwards remain on such footway or sidewalk." The attorney for the commonwealth also read that clause in the fifteenth section of the city charter, (act of 1821, c. 110,) which declares, "that the mayor and aldermen and common council of the said city shall have power to make all such needful and salutary by-laws, as towns by the laws of this commonwealth have power to make and establish, and to annex penalties not exceeding twenty dollars for the breach thereof." He also read that clause in the seventh section of the act of 1785, which empowers the inhabitants of any town "to make and agree upon such necessary rules, orders, and by-laws, for the directing, managing, and or-

dering the prudential affairs of such towns, as they shall judge most conducive to the peace, welfare, and good order thereof."

Sidney Bartlett, for the defendant, first objected to the form of the complaint, and contended that the act of 1817, c. 50, which declares "that all fines, forfeitures, and penalties accruing within the town of Boston, for the breach of any by-law of the said town, which is now in force, or which may hereafter be duly enacted or made, may be recovered by indictment, information, or complaint, in the name of the commonwealth, in any court competent to try the same," was not warranted by the constitution; inasmuch as these by-laws being matter of private right, the parties in litigation should be placed on an equality as to the costs of suit. He next contended that the by-law was inoperative and void, for various reasons. 1. Because it was repugnant to the statutes of the commonwealth, relative to the subject matter; particularly to the act of 1786, c. 81, and the act of 1796, c. 58: and inasmuch as it creates and assesses a tax for the amendment and repair of highways, contrary to those statutes, and to that provision in the fifteenth section of the city charter, "that in the assessment and apportionment of all such taxes upon the polls and estates of all persons liable to contribute thereto, the same rules and regulations shall be observed as are now established by the laws of this commonwealth, or may be hereafter enacted, relative to the assessment and apportionment of town taxes." The duty imposed by the ordinance, was, he considered, in the nature of a tax imposed without the consent of the people, expressed by an act of the legislature. 2. The ground of the defendant's second objection to the validity of the by-law, was, that it imposed a tax upon part only of certain persons, not on all owners and occupants of land in the city of Boston, inasmuch as it did not extend to owners and occupants of land in that part of the city called South Boston. It was for this cause partial and unjust, as the public burdens should be equally assessed on all such owners and occupants in the city. The last objection to the

Commonwealth v. Goddard.

complaint, on which the counsel for the defendant relied, was, that inasmuch as the sidewalk in Kingston street was built prior to March 16, 1833, and its breadth is more than one sixth of that street; and further, as it does not appear that the width of that sidewalk has been regulated by surveyors of highways, since the passing of the act of 1833, c. 128, the defendant was not by law bound to remove the snow therefrom.

Parker and B. R. Curtis, for the commonwealth.

THACHER, J. The counsel for the defendant contends that the act of 1817, c. 50, is unconstitutional. If the question arising under a by-law or ordinance of the city, were matter of mere private right, it would be both impolitic and unjust to prescribe the remedy in such form as would subject an innocent citizen to the vexation of a criminal process, without granting to him any redress upon his acquittal. But the by-laws and ordinances of the city are matters of general convenience and necessity. If the penalty for a breach were to be sued for in every instance, and recovered in a civil action, the law would be, in a great degree, without efficacy; and it would be, in many instances, as great a punishment to the prosecutor to commence and carry on the suit, as to the party prosecuted. Therefore the mode of prosecuting in these cases, in the name of the commonwealth, is both legal and effectual.

The counsel further contends that the by-law is inoperative and void, because it is repugnant to the statutes of the commonwealth; and partial and unjust because the people of South Boston are exempted from taxation under it. The act of 1786, c. 81, "making provision for the repair and amendment of highways," and the additional act of 1796, c. 58, were never intended to apply to the town of Boston. From early time, the streets of that town have been laid out, altered, and kept in repair by laws and usages adapted to its situation as a great and populous metropolis.¹ Certainly since the act of 1799,

¹ See the act of 4 W. & M. c. 1, which, in the second section authorizes justices and selectmen to lay out streets, &c. in the town of Boston. Prov. Laws, ed. 1759, p. 2.

c. 31, "to regulate the paving of streets in the town of Boston, and for removing obstructions in the same," the streets and sidewalks of that town have been constructed and regulated by special laws, enacted for that purpose, and not by the general highway laws of the commonwealth. By the act of 1786, c. 81, when the highways are blocked up or incumbered with snow, the surveyors are required "forthwith to cause so much thereof to be removed or trod down, as will render the roads passable." But except in the city of Boston, and perhaps in a very few other of the large towns of the commonwealth, there are no sidewalks to the roads, and it was not necessary to pass any general law for their regulation. In the city of Boston, however, where the streets are generally narrow, and badly constructed, the sidewalks are indispensable, both for the convenience and safety of foot passengers; and therefore the special laws have prescribed the manner in which they shall be constructed and used. If the snow on the sidewalks is not removed immediately after it has fallen, it will soon melt and be formed into ice, which would destroy the walk in a great degree for females and invalids, and for many other persons. It is in the nature of a nuisance which must be forthwith abated. The necessity of the case is the best defence of the law. The city could not, unless at an enormous expense, employ a sufficient number of persons, who should be constantly ready to remove the snow from the sidewalks before it is trodden down, and formed into ice. Such an addition to the tax would be perhaps a just ground of complaint. Some general regulation on this subject is necessary, and none appears preferable to that, which this ordinance prescribes, that the occupants of the several houses shall clear the sidewalks in front of their lots, and where a house or lot is without an occupant, that the duty shall fall on the owner. If every occupant takes care of his own sidewalk, the duty will be done with despatch, and without delay; nor will the burden upon individuals be great. Where a sidewalk like that of the defendant's,

covers a large extent, the burden will be increased in proportion to that extent. It is equal however on the description of persons on whom it falls; certainly not so unequal, as to be a sufficient ground to set it aside for that cause. The ordinance in this case, is not repugnant to the general highway laws; because those laws are not in force, and do not apply to this city. If I am correct in this opinion, it will follow, that no variance between those laws and the provisions of the ordinance will avail to set it aside.

I do not consider that the ordinance imposes a tax on property, but is rather a personal duty on the occupants of real estate within the city, to remove from their premises an inconvenience, which could not be so well done in any other way. If it is admitted, that the sidewalk is a part of the street or public townway, it seems not to be an unreasonable personal service, to require the occupants of all buildings adjoining on sidewalks, to keep them clean and free from nuisance, it being a common and mutual benefit, and for the comfort not only of themselves, but of all others who shall pass by and over them. The ordinance is not repugnant to those special laws which relate to the streets of this city; for those laws make no provision for removing snow from the sidewalks. It appears rather to be a branch of municipal regulation, and to fall within the principle of an act of the colonial government of so early a date as the year 1670, which was afterwards adopted by the provincial government, and makes part of the law of this commonwealth. This act authorized the freemen of every town "to make such laws and constitutions as may concern the welfare of their town; provided they be not of a criminal, but of a prudential nature, and that their penalties exceed not twenty shillings for one offence, and that they be not repugnant to the public laws and orders of the country."¹

¹ See the charters and general laws of the colony and province of Massachusetts Bay, pp. 195 and 249. And act of 1785, c. 75, s. 7.

But if it is true, that by exempting South Boston from the operation of this ordinance, it becomes partial and unjust in its operation, and imposes an unequal burden upon part of the city; the objection would certainly go to its validity. If there be not good and sufficient reason for exempting South Boston from the operation of this ordinance, its partial nature would be good reason to set it aside; for a by-law should be reasonable in its nature, and just and equal in its operation. The act of 1803, c. 111, which set off the north-east part of the town of Dorchester, and annexed the same to the town of Boston, provides, among other things, "that the town of Boston shall not be obliged to complete the streets laid out by their selectmen pursuant to this act, sooner than they may deem it expedient so to do." The annexation of South Boston was the fruits of long and earnest application on the part of the proprietors of lands in that section. The old town would not finally consent to it, but upon the conditions which are mentioned in the act, among which that relating to the streets was deemed essential. Now it would be manifestly unreasonable to require the occupants and owners of lots in South Boston to remove the snow from their sidewalks, until the city shall have adopted their streets, and the sidewalks shall have been constructed according to the laws and regulations which prevail in the old parts of the town. And as it does not appear that the streets in South Boston have been adopted by the city, it appears to be good reason for the discrimination which the ordinance has made in favor of that section.

The counsel further contends that as the sidewalk on Kingston street was built prior to the act of 1833, c. 128, and as its width does not appear to have been regulated since that time, the defendant was not bound to remove the snow from that street. That act is "in addition to the several acts respecting the streets of Boston," and repeals no prior act. It authorizes the city council, by any ordinance, "to empower the surveyors of highways of the city, so to regulate the width and height of

Commonwealth v. Lancaster.

the sidewalks of any public squares, places, streets, lanes or alleys in said city, as shall, in judgment of said surveyors, be most conducive to the convenience and interest of said city." This act is affirmative in its nature, and prospective in its operation; and while it provides a mode to alter and regulate sidewalks, in future it cannot be construed to abolish or discontinue, or affect any streets or sidewalks that were then in existence, or to repeal any ordinance of the city duly made, and in force at the time.

To these several orders, opinions and instructions of the judge, the defendant's counsel duly excepted at the time, and requested that his exceptions should be noted and allowed, and made part of the record, which was done; and the defendant was allowed the benefit of them, and of any other objections arising out of the record, in any future proceedings which he might institute, to test the sufficiency of the complaint, and the validity of the ordinance on which it was founded.¹

The jury returned a verdict of guilty, and the judgment of the police court was affirmed, with the additional costs.

JUNE TERM, 1835.

COMMONWEALTH v. EZEKIEL F. LANCASTER.

The note of a minor is not property within the act of 1815, c. 136. (Rev. St. c. 126, s. 32.)

Where, by means of false pretences, a party had obtained from a minor his note, which at the time of the prosecution was not due nor paid; it was held, that the offence of cheating by false pretences was not complete.

THIS indictment was founded on the act of 1815, c. 136,

¹ Upon a petition to the supreme judicial court for a certiorari to the municipal court, the decision in this case was affirmed, and the petition dismissed. (*Goddard, petitioner*, 16 Pick. 504.)

and charged the defendant with having designedly and fraudulently obtained from one Isaac Miles, his negotiable note of hand for two hundred and eighty-one dollars, by means of certain false pretences, and with the intention to defraud him of that amount. It appeared, at the trial, that the said Isaac Miles bought of Lancaster a printing-press, and a lot of printing types, and gave for them in payment the note in question, which had not yet become due, and to secure payment of the note, he had executed to Lancaster a mortgage of the press and types, which were remaining in Lancaster's possession at the commencement of the prosecution. The false pretence alleged in the indictment was, that Lancaster had declared to Miles, that the press and types belonged to him, and were free from any charge or incumbrance. It was alleged, however, in the indictment, and proved at the trial by the testimony of one David H. Kane, who was sworn and examined as a witness, that in the month of September, 1834, he sold the whole printing establishment to Lancaster, taking in payment his two notes each for seven hundred dollars, and that, to secure the payment of these notes, Lancaster executed to him a mortgage of the press and types; and that the deed of mortgage was recorded in the office of the city clerk, according to the act of 1832, c. 157. Kane further testified, that during the negotiation between Miles and Lancaster, which was in March, 1835, the latter asked him to consent to his selling a portion of the articles, to which he agreed, provided that an amount of property equivalent in value should be substituted in their place. But the witness said, that there was no removal of the property, and that he had heard nothing further of the negotiation. It appeared further, that after Lancaster had obtained the note of Miles, he passed it to Messrs. Hilliard, Gray, & Co. as collateral security for a purchase of books, to the amount of three hundred dollars in value, which they had sold and delivered to him on credit.

At this stage of the trial, the attorney for the commonwealth suggested to the court, that, owing to some accident or

misunderstanding that the trial was not to come on at that time, Miles was not present. The judge proposed to postpone the further hearing. But as it had been stated by Mr. Kane, in the course of his testimony, that Isaac Miles was a minor, a question arose as to the effect of that fact, which Mr. Parker said could not be controverted. He further said, that if that fact was fatal to the prosecution, he was willing to submit the case to the jury under the direction of the court. George Bond, the foreman of the jury, inquired of the court, whether that fact would alter the moral turpitude of the transaction on the part of the defendant; and whether it would be right to subject Miles to the necessity of resisting payment of the note by pleading his minority.

Parker, for the commonwealth.

The defendant had no counsel.

THACHER, J. The charge against Lancaster, for which he is on trial, is for defrauding Miles of his property by false pretences. If no property has been obtained, however dishonest were his intentions, the crime is incomplete, and Miles was not defrauded. If Miles had paid the note, presuming that it was binding, he would have been defrauded of the amount paid. But it being admitted that Miles, at the time he signed the note was a minor, it was not binding on him, and he could not be compelled to pay it. The law does not consider an infant bound by any executory contract which is not for his advantage. He is able to contract for board, clothing, instruction and other necessities according to his degree; because these are needful to him, and for his benefit. If Miles should hereafter choose to pay the note, having a full knowledge of the facts, it would be considered a voluntary payment on his part, and consequently not a ground to impute fraud to Lancaster. But as the note was made by a minor, and contained no binding obligation in law on him to pay it, and payment has not been made, it is not to be considered as

Commonwealth v. Barnard.

property of which he has been defrauded; and therefore you are bound to find the defendant not guilty.

The jury accordingly found the defendant not guilty. But the court refused to order his discharge, until Messrs. Hilliard, Gray & Co. had an opportunity to present a complaint against him, if they should see fit to do so. For which purpose, he was ordered to be brought into court on the 15th day of June, to which the court was adjourned.

SEPTEMBER TERM, 1835.

COMMONWEALTH v. WILLIAM BARNARD.

Where, upon objection to a witness for defect of religious faith, he stated at first that he believed in a God; and afterwards that he did not consider an oath more binding upon his conscience than a simple promise, that he attached no religious obligation or sanctity to an oath, and that he had no idea of a God who knows the secrets of all hearts, and who rewards and punishes men according to their conduct; such witness was *held* to be incompetent.

In the trial of this case, which was an indictment charging the prisoner for stealing money of Abner Kneeland, in the dwelling-house of Edward H. Whitaker, an objection was made to the competency of Whitaker, who was offered as a witness for the commonwealth, on the ground of a defect of religious faith. He was sworn on the *voire dire*, and said at first that he believed in a God. But upon a suggestion of George T. Bigelow, Esq. counsel for the prisoner, he was further interrogated by the court, as to the meaning which he attached to the expression in the oath, "So help you God." He said that it meant that he should relate the truth; but that he did not consider an oath to be more binding upon his conscience, than a simple promise. The court being desirous of further

Commonwealth v. Wyman and another.

information of the sentiments of the witness, made other inquiries, took down his answers in writing, and read them over to him afterwards. He declared that he attached no religious obligation nor sanctity to an oath, administered to him in a court of justice. He further said that he had no idea of such a being as the one living and true God, who knows the secrets of all hearts, who takes knowledge of the actions of men, and who will reward or punish them as their conduct in this life is good or evil.

The court considered the witness as not qualified, and did not permit him to be sworn in chief. But although the testimony of this witness was excluded, the prisoner was convicted of the larceny by other evidence. He was also convicted on three other indictments for like offences at other times, which were, with the consent of the prisoner and his counsel, put to the same jury.

MAY TERM, 1836.

COMMONWEALTH v. MAVERICK WYMAN AND ALBERT ROBINSON.

After the incompetency of a witness, on account of a defect of religious belief, has been established by testimony, he cannot be sworn upon the *voire dire* to restore his competency by his own declarations.

On the 16th day of May, Maverick Wyman was put on trial. He was charged with a conspiracy with one Albert Robinson to obtain goods from certain merchants in Boston, by false pretences. The attorney for the commonwealth offered Robinson to be sworn as a witness, to prove the conspiracy in Lowell, where both resided. Other witnesses had testified, that the goods to a large amount were sold and delivered to Robinson, on his personal application. The conspiracy, if

Commonwealth v. Wyman and another.

there was one, was made between him and the defendant, and of that fact Robinson was the only witness. The county attorney stated that, in consequence of information that Robinson had received assurances from the attorney of the northern district, he had entered a *nolo prosequi* as to him.

The counsel for the defendant, objected to the oath being administered to the witness, on the ground that he was an Atheist, and called witnesses to prove the fact.

Several witnesses having been examined in proof of this allegation, the county attorney, on the ground that Robinson might have changed his religious opinions, moved that he might be sworn on the *voire dire* ; but, upon a suggestion from the court, evidence was introduced tending to show that there had been such a change of opinion.

Parker and *S. H. Mann*, for the commonwealth, in support of the motion, cited *Hanscomb v. Hanscomb*, (15 Mass. 184.)

R. Choate and *H. C. Merriam*, for the defendant, cited *Jackson v. Gridley*, (18 Johns. 98) ; *Curtis v. Strong*, (4 Day, 51) ; *Wakefield v. Ross*, (5 Mason, 18, note.)

THACHER, J., then delivered the following opinion :

The question to be settled by the court is, whether Albert Robinson is to be sworn to qualify himself as a witness in this case for the government. Our law considers an oath as a religious act, which is binding on the conscience of the witness, and therefore, where he is not a Christian, he is to be sworn according to the peculiar ceremonies of his religion. (Rev. St. c. 94, s. 11.) It is an act of religion : the witness appeals to God, who, though invisible, is believed by him to be present, and invokes his displeasure, if what he says is false. It is manifest, if he denies all belief in God, and all accountability to him, that the witness lacks the legal qualification. The law which excludes an Atheist from being sworn as a witness, is, I think, founded in wisdom. What security have we for his conscience, and what confidence can you repose in his testimony, if it is for his interest to pervert the truth ? It is for the

Commonwealth v. Wyman and another.

protection of the citizen, that he is not to be deprived of his life, property, liberty or character, by the judgment of a court of justice, unless upon the testimony of witnesses who regard an oath as carrying with it the highest religious sanction. Shall a citizen who has hitherto stood fair in society, be rendered infamous, and his children be doomed to perpetual ignominy, by the testimony of one, who, in addition to a total disregard of accountability to the Supreme Being, has perhaps the deepest interest to pervert the truth? It is far better, that the lips of such a man should be sealed, and that they should not be suffered to be opened in a court of justice. This is undoubtedly for the security of innocence; and if the rule should sometimes operate to screen the guilty, it is such an inconvenience as is incident to all general rules, and it does not follow, that the rule is not founded in sound policy. It must be considered too, that this is not a question of right on the part of the witness who is offered to be sworn, but of the party who may be prejudiced by his testimony. The witness is not deprived of a right; for what injury is it to him, that he is not called to the stand? It is like the case of a juror, who is rejected from the jury for alleged turpitude. He cannot complain that he is relieved from the burden of that duty; but it is the great constitutional safeguard of the citizen, to be tried by jurors, good men, free from suspicion, and as disinterested as the lot of humanity will admit. It may be said, that although the witness cannot complain that he is not sworn, he is yet disgraced by the cause of his rejection; and it may sometimes happen that it would be advantageous to an individual, to be sworn as a witness, or to serve as a juror. But the law does not regard the wounded feelings of the individual; it is only solicitous to protect the life, liberty, property, and character of the parties, by a fair trial.

When the witness was called in this case, the counsel for the defendant did not move to examine him on the *voire dire*, in order to discover whether he was an Atheist. Declaring that

they did not confide in his veracity, and asserting that he did not respect the religion of an oath; they undertook to prove the fact. This seemed to me to be a course free from doubt or objection. For it may be well doubted, whether it is proper to put a citizen on oath to declare his own turpitude. If the witness should decline to answer questions in such case, might he not allege that he was shielded by the bill of rights from furnishing evidence against himself; and therefore, that he was not bound to avow or to deny his belief of certain doctrines, which would tend to degrade him in the general estimation, or to lessen him in the opinion of any portion of the community, or to disqualify him as a witness in a court of justice? Besides, if his oath is to be taken on this subject, why should he not be believed on any other point, which is involved in the issue?

There has been in this case a full examination of witnesses relative to the character of Albert Robinson. He is of sufficient age and discretion to know the elements of religion, natural and revealed; and it is not presumed that he is ignorant of the sentiments of the community on this most interesting subject. If faith is to be reposed in the testimony of witnesses, it has been fully shown, that, at several times, within the last eighteen months, he has declared his disbelief in the existence of a God, of a future state, and of all future accountability. It does not appear, that these declarations were made in the heat of debate, nor by way of inquiry to remove doubts, but with deliberation. It would seem, too, that his conduct and conversation were practical illustrations of his religious notions, or rather of his abandonment of all religion. The testimony has established the fact, that as late as the month of November last, he was an avowed Atheist. To counteract this testimony, the government has produced sundry witnesses, to show his declarations of belief in a God, and a change of character. Nearly allied to him in blood and affection, they undoubtedly said as much in his favor as the truth would justify. But I confess, it does not appear to me, that they have proved a change.

Commonwealth v. Wyman and another.

Confined in jail for months, but admitted to the visits of his friends, yet no one undertakes to say, that he has confessed his folly in denying a God, or that he had suspected, that a just retributive providence had arrested his career. He has not asked for advice or consolation, although enlightened and pious men would, I doubt not, have willingly hastened to his succor. In the language of Judge Swift,¹ "if an infidel has any conscience, or regard for truth, he would, if questioned, honestly avow his creed and be rejected. If he has no conscience, or regard for truth, and his feelings incline him to favor the party calling him, he would either deny the opinions imputed to him, or pretend to a sudden conviction, that he had been in an error, and that he now believed in a God, and a future state of rewards and punishments."

The incompetency of this witness has been established by proof. To permit him to restore his competency by his own declarations, under oath or otherwise, would be to allow a witness to be sworn, after it had been proved, that he wanted the requisite qualification, and that he ought not to be believed on his oath. "It would be incongruous, says Spencer, the Chief Justice of New York,² to admit a man to his oath, to ascertain, whether an oath had any binding influence on his conscience. If he had no idea of the sanction which the appeal to heaven by taking an oath, creates, what is there to prevent his swearing false in the preliminary inquiry?" "It does appear to me," says the same learned judge, "that upon principle, after it is proved, that a witness offered is at the time he is offered, an infidel, that he can neither be sworn to disprove the fact, nor be permitted, without oath, to make himself competent. I say an infidel at the time he is offered, for the proof ought to relate to avowals and opinions expressed by the witness within such time, as to induce the presumption that his infidelity still exists. If the declarations were made some time before, and it could

¹ Treatise on Evidence, 49.

² *Jackson v. Gridley*, 18 Johns. 98.

Commonwealth v. Wyman and another.

be proved by external signs, that there had been a change of mind, such as a pious and devout attention to religious worship, and declarations in the belief of God, and a future state of rewards and punishments, such proof might reinstate the witness, and entitle him to be sworn." I find also, that in a trial before Judge Story,¹ that learned and eminent judge, who is so profoundly versed in the principles of our law, and who has done so much to illustrate it, would not suffer witnesses to be examined personally as to their belief, after it had been proved, that they did not believe in the existence of a God, or of a future state, and that they had no religious belief.

Before I conclude my remarks, I would say, that I think, that much of the infidelity of mankind, especially among the young, results from ignorance, presumption, and vanity. It hardly required the authority of an inspired writer, three thousand years ago, to justify the declaration, that it is *the fool, who has said in his heart, that there is no God*. That this fair world is without an intelligent creator; that all things, however wise in construction, however regular and perfect in action, are the fruit of blind chance, and that they are perpetuated by chance, — are monstrous propositions, contradicted by all experience, absurd and absolutely incomprehensible. To avoid the absurdity, modern propagators of Atheism, pretend to make a god of stocks and stones, of the air and light; admitting nominally the existence, but denying the attributes of the Deity. While men yield to such delusions, the law refuses to them some of its privileges; and admonishes them, in that mild way, to correct their dangerous errors, before she will confide in their integrity or intelligence, to dispose of the rights of others in a court of justice. The witness is therefore rejected.

After the court had pronounced this decision, and after a short conference of the counsel, the county attorney observed, that by the exclusion of the testimony of Robinson, the gov-

¹ *Wakefield v. Ross*, 5 Mason, 18. *Curtis v. Strong*, 4 Day, 51.

Commonwealth v. Wyman and another.

Confined in jail for months, but admitted to the friends, yet no one undertakes to say, that he has folly in denying a God, or that he had suspected retributive providence had arrested his career. He asked for advice or consolation, although every man would, I doubt not, have willingly helped him. In the language of Judge Swift, "if a man has no conscience, or regard for truth, he would not avow his creed and be rejected. I have no regard for truth, and his feelings in calling him, he would either deny or pretend to a sudden conviction, and that he now believed in rewards and punishments." 1836.

GRANT AND JOHN ANDERSON.

The incompetency of proof. To permit him to give evidence of an accomplice alone, if they give full declarations, under oath, is most proper to acquit, where the testimony of the witness is not corroborated in material circumstances.

requisite qualifications for his oath. "It was proved, with four other persons who were named Justice of New Hampshire, were charged with stealing thirty-five whether an accomplice, and were charged with stealing thirty-five hundred and fifty-four dollars, the property of If he had been engaged for some time in the commission of great by taking the baggage-car of the Providence railroad. The persons false in this larceny were convicts, who had escaped from says it was proved in this country, where they prov. and found their way to this country, where they infi. and been engaged for some time in the commission of great crimes. These defendants, with William Hosford, an accomplice in the felony, were arrested on the following day, on their way to New York. The bills were found at Framingham, in this state, where they were deposited by Hosford on the night of the robbery. Hosford was used as a witness for the prosecution. His testimony was strongly impugned by the defendants' counsel, but was corroborated by upwards of twenty different and material facts.

Commonwealth v. Grant and another.

Choate and Park, for the defendants.

Parker, for the commonwealth.

The law relative to the evidence of an accomplice was stated, in committing the case to the jury, as follows :

THACHER, J. When I observed to you, on the adjournment of the court last evening, that the case was to be decided on your responsibility, I did not mean to withhold from you, on my part, such instructions on points of law, as would enable you to take a just view of the evidence, and to come to a correct result. It is a case in which the government principally relies on the testimony of an accomplice, to obtain a verdict against the parties on trial. An accomplice may be examined as a witness both in civil and criminal cases, notwithstanding his participation in the guilt of the crime. No promise of pardon, whether absolute or conditional, will render an accomplice incompetent. My Lord Hale says, " Though such a party be admissible, as a witness in law, yet the credibility of his testimony is to be left to the jury, and truly it would be hard to take away the life of any person upon such a witness, that swears to save his own, and yet confesseth himself guilty of so great a crime, unless there be also very considerable circumstances, which may give the greater credit to what he swears." ¹ In every case, it is understood that he should make a fair and impartial disclosure of his own, as well as of the guilt of his companions. And if he is guilty of perjury in any one particular, wilfully stating a falsehood, or designedly concealing a material fact ; it is the right and duty of the jury to withhold all faith from his testimony. For it is better that the guilty should escape, than that they should be convicted on the testimony of perjured witnesses. While there is no doubt as to the competency of the accomplice, upon any principle, the condition is, not that he should by his testimony convict, nor even that he should give evidence

¹ H. P. C. 305.

Commonwealth v. Grant and another.

unfavorable to any prisoner, but that he should make a fair disclosure of what he knows of the transaction. His credit is for the consideration of the jury. The acknowledged turpitude of the witness stamps his testimony with suspicion; and it cannot be denied, that he has a strong temptation, to endeavor to effect, by his testimony, the conviction of the party accused, and on trial.

The jury may convict on the evidence of the accomplice alone, provided they give full credit to it. But it is rarely safe to do so; and it is most proper to acquit the party, where the testimony of the accomplice is not corroborated in material circumstances. But it is not necessary that the accomplice should be confirmed in every circumstance. If that were required, his testimony would not be wanted; because the guilt of the accused would in such case be proved without the aid of the accomplice. He is supposed to know much, that is known only to him and to his associates. It is often necessary for the government to use the testimony of an accomplice to bring to light deep-laid schemes of guilt. The confederacies of bad men are usually, if not always, not only conceived in iniquity, but executed in secret. Although it could not be denied, that to betray the secret of the confederacy is a breach of plighted faith among themselves; yet it is some amends to society, and it is much to be desired, that such men should always distrust one another. But where persons are to be convicted on the testimony of an accomplice, who is as guilty as themselves, it seems to be proper to allow to them every chance to protect themselves against his private malice and interested villany; and therefore I have thought it to be my duty, in this case, not to restrict the learned and faithful counsel for the prisoners in the privilege of cross-examination.

Hosford has related the facts, and has been subjected to a most severe cross-examination. He has stated his own participation in the guilt apparently without reserve. He did not withhold, though it was evident he was reluctant to state, many

Commonwealth v. Whitmarsh.

circumstances of his life which had occurred in foreign countries, and since his arrival in the United States, which tended greatly to his disgrace. When the counsel for the prisoners pressed him very hard, he could escape from their severe scrutiny only by declaring, that he knew he did not stand before them as an innocent man — if he had not dealt in crimes, and kept such bad company, he said he should not have been brought to that place, — but that it was necessary for him to utter the truth on this occasion ; and it is for you to decide whether he was sensible of the duty as well as the privilege of his situation.

The judge then adverted to the various circumstances, in which Hosford was corroborated by other witnesses in the case.

The jury returned a verdict that both were guilty.

JULY TERM, 1836.

COMMONWEALTH v. JOSEPH A. WHITMARSH.

The English law of libel made part of the common law, and was used and practised upon by the courts of Massachusetts, before the adoption of the constitution.

The legislature and the supreme judicial court of Massachusetts have repeatedly, since the adoption of the constitution, recognized libel as an indictable offence.

The sixteenth article of the bill of rights did not repeal the common law of libel, as a criminal offence.

THE facts in this case, and the points made by counsel, will appear in the following opinion of the court.

Parker, for the commonwealth.

Hallett, for the defendant.

THACHER, J. At the last term of this court, the jury re-

turned a verdict against the defendant, that he was guilty of the offence of libel, which is charged in the indictment; whereupon his attorney filed a motion, in arrest of judgment, assigning as the cause thereof, that to publish a defamatory libel, is not an offence against any law of this commonwealth. Prior to the trial, he had moved, by his attorney, that the indictment should be quashed, "because, it concludes, not against the form of any statute, but against the peace and dignity of the commonwealth, and because it describes no offence which is such by our common law." This motion was then argued at length, and overruled by the court. The defendant's counsel addressed the like argument to the jury, but without success. The importance attached to the subject makes it incumbent on the court, to pronounce a deliberate opinion.

By the sixth article of the sixth chapter of the constitution of this commonwealth, it is declared, that "all laws which have heretofore been adopted, used and approved in the province, colony, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted, as are repugnant to the rights and liberties contained in this constitution."

The attorney for the commonwealth has contended, in his argument, that the law of libel, as it existed in the English common law, at the time of the adoption of the constitution, made a part of the common law of Massachusetts, and that it has never been repealed, although, he admits, that it has been modified by our constitution and laws. The attorney for the defendant denies, on his part, that the English common law of libel was ever, in fact, adopted in this commonwealth;—and he insists, that, if it ever was in force here, prior to the adoption of the constitution, it was repealed by the sixteenth article of the bill of rights. While he admits, that a civil action may, by virtue of another article in that instrument, be brought to redress the wrong which a person may suffer in his reputation,

from a defamatory libel; he denies that the offence of libel is such an injury to the public, that the guilty author or publisher may be punished therefor by indictment.

It becomes necessary to settle, whether the offence of libel was known to the common law of Massachusetts, before the adoption of our constitution, in 1780. I am not required to discuss the general law of libel; nor to show how necessary it is, in a well-regulated state, that libels should be restrained, and that their authors should be punished. Nor will it follow, because the laws of every well-regulated state must restrain libels, that our ancestors adopted into their code the English law of libel.

I. I shall inquire into the origin of the common law of Massachusetts.

II. Whether the English law of libel made part of the common law, and was used and practised upon by the courts of Massachusetts, before the adoption of the constitution.

III. Whether the legislature, and the highest judicial tribunal of the commonwealth, or either of those branches of the government, have, since the adoption of the constitution, recognized libel as an indictable offence.

IV. Whether the sixteenth article of the bill of rights has repealed the common law of libel, as a criminal offence, and what is the meaning of that article?

I. As to the origin of the common law of Massachusetts. All our law began with the consent of the legislature, which alone can express the will of the people; but whether a law is now such by usage or writing, is the same thing. It is true, however, as was said by Dana, C. J.¹ that usage makes and establishes the common law of a country. "The common law of our country, at the time of the adoption of the constitution," says the late Chief Justice Parker, "may as well have existed

¹ *Com. v. Leach*, (1 Mass. 59.)

Commonwealth v. Whitmarsh.

in the form of statutes and ordinances of the colonial and provincial legislatures, as in any other way." ¹

The common law of a country is to be learned from any veritable sources : — from the acts and proceedings of its legislature, from the practice of its courts, from the decisions of its judges — it is to be found in the records and reports of judicial trials, in the history of the country, and in other authentic documents. The law on any point is matter of evidence. But where no statute or other written evidence is found to exist, the law may be ascertained by the testimony of learned men, who have devoted their lives to the study of jurisprudence, and who are acquainted with its principles ; as the laws of nature are known to the astronomer, or those of any art or science to its learned professors. The settlers of the colonies of Plymouth and Massachusetts were Englishmen, and brought to this country, as their right and inheritance, the common law and statutes of England, so far as they were adapted to the condition of a new settlement. "The laws they intended to be governed by," says Hubbard,² "were the laws of England, the which they were willing to be subject unto, though in a foreign land, and have since that time continued in that mind for the general, adding only some particular laws of their own, suitable to their constitution, in such cases, where the common law and statutes of England could not well reach or afford them help in emergent difficulties of the place — possibly on the

¹ *Com. v. Holmes*, (17 Mass. 338.)

² The Rev. William Hubbard was, I believe, the earliest historian of Massachusetts. He was educated at Harvard College, and belonged to the first class on whom were conferred the honors of that university, in the year 1642. Dr. Eliot says of him, "that he was certainly, for many years, the most eminent minister in the county of Essex, equal to any in the province, for learning and candor, and superior to all his cotemporaries, as a writer." *Eliot's Biog. Dict. of N. E.* The general court bore a signal testimony to his merit as a historian, by a vote of thanks, and by ordering the treasurer to pay to him fifty pounds in money. — *Records of the General Court*, Oct. 11, A. D. 1693.

same ground, that Pacavius sometimes advised his neighbors of Capua, not to cashier their old magistrates, till they could agree upon better to place in their room ; so did these choose to abide by the laws of England, till they could be provided of better."

The same writer, speaking of the civil polity and form of government of the Massachusetts Company, says, (p. 114,) "by the royal charter of Charles I. (1628,) the patentees, with their associates, are declared to be a body politic, incorporate together — and are styled the governor and company of New England. To the governor, are to be added a deputy-governor and eighteen assistants, who, with the rest of the company, free of the corporation, have power to make orders and laws within themselves, for the good of the whole, not repugnant to the laws of England, and to correct and punish all offenders, according to the said orders and laws, as is more at large described in the said charter. But this corporation or body of people, being but then an embryo, was willingly subject to, and governed by, those wholesome and known laws of the kingdom of England, acknowledging only its willing obedience to such rules and ordinances, as were by the corporation agreed upon as necessary for the carrying on of their present affairs, and yearly sent over from England, while the charter remained, with the principal part of the patentees, in England."

That learned and accurate historian, Judge Minot, in his History of Massachusetts, says, "that King James I. in the eighteenth year of his reign, (3d Nov. 1620,) erected a body politic or council, in the town of Plymouth, in the county of Devon, consisting of forty respectable adventurers. To them he granted New England, including so much of that continent as lies from forty to forty-eight degrees of northern latitude, as, continuing that breadth through the main land, extends from sea to sea. At the same time, he gave to this body politic ample powers for the planting and governing of this territory, by laws agreeable to those of the realm of England, as nearly as circumstances would permit."

Commonwealth, *v.* Whitmarsh.

“In the third year of King Charles I., the council of Plymouth, thus established, granted the country, which may be called Massachusetts proper, extending from three miles northward of Merrimack river, to three miles southward of Charles river, unto Sir Henry Roswell and others, who also received a charter from that king, confirming their grant, (4th March,) and vesting them with powers of jurisdiction over the country.”¹

It would seem that the charter of James I. to the colony, was intended to constitute a trading company, residing within the kingdom, like the charter of the East India Company: but when it was removed to Massachusetts Bay, the patentees supplied its defects by their liberal construction of its provisions, and actually assumed not only to elect their governor, and all other officers, but to exercise, in many respects, the essential rights of sovereignty. They erected courts, imposed taxes, enacted laws to punish criminal acts, and even inflicted capital punishments. For the basis of their civil code, they took the common law and statutes of England, so far as they were adapted to the condition of the new settlement. Having power to make all laws which were necessary, provided the same were not contrary to the laws of England, they passed a law, in the year 1641, exempting lands from all feudal exactions; thus making lands free to be alienated by the proprietor, without the consent of any lord, or the payment of a fine to the government. The rights exercised by the colonists, under their charter, were so extensive, and perhaps so inconsistent with a state of colonial dependence on the mother country, that it raised the jealousy of the crown, and led, among other things, to the loss of their charter, in 1684.

These views, relative to the common law of Massachusetts, drawn from its ancient history and charters, are conformable to the opinion of the supreme judicial court, expressed in the case of the *Commonwealth v. Knowlton*, (2 Mass. R. 530.) “Our

¹ 1 Minor's History of Massachusetts, 18.

ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes, in force at the time of their emigration. These statutes were never reenacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. To these, may be added some ancient usages, originating, probably, from laws passed by the legislature of the colony of the Massachusetts Bay, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people. So much, therefore, of the common law of England, as our ancestors brought with them, and of the statutes then in force, amending or altering it; such of the more recent statutes as have been since adopted in practice: and the ancient usages aforesaid, may be considered as forming the body of the common law of Massachusetts, which has submitted to some alterations by the acts of the provincial and state legislatures, and by the provisions of our constitution." This opinion was pronounced by the supreme court in the county of Kennebeck, June term, 1807, present, Parsons, C. J., Samuel Sewall, and George Thacher, justices.

II. Did the English law of libel make part of the common law, and was it used and practised upon by the courts of Massachusetts, before the adoption of the constitution?

So early as the year 1645, the colonial government passed a law, declaring the punishment of every person, of the age of discretion, which was accounted fourteen years and upwards, who should wittingly and willingly make or publish any lie, which might be pernicious to the public weal, or tend to the damage of any particular person, or with intent to deceive and

Commonwealth v. Whitmarsh.

abuse the people with false news and reports.¹ A like law was used by the colony of Plymouth. This act was revised in the year 1692, by the provincial legislature, under the charter of William and Mary, and it was declared to be an offence, "if any person of the age of discretion, should wittingly and willingly make or publish any lie or libel, tending to the defamation or damage of any particular person, or make or spread any false news or reports, with intent to abuse and deceive others." The jurisdiction over such offences, was given, by this act, to justices of the peace, who were authorized to impose a fine for the first offence, and to require sureties for the good behavior. If the party should, however, be unable to pay the fine, then he was to be set in the stocks, or to be corporally punished by whipping.²

By an act of the provincial legislature, passed 4 W. & M., "all the local laws respectively ordered and made by the late governor and company of the Massachusetts Bay, and the late government of New Plymouth, being not repugnant to the laws

¹ Anc. Chart, c. lxiv.

² Laws of the colony and province of Mass. 240. The late C. J. Parker, in an address to the grand jury of the county of Suffolk, (supreme judicial court, November term, 1811,) remarks on this law: "That the abuse of this statute, in many instances, and the frequent oppression which occurred under it, has probably been the reason why it has never been revised since the adoption of our present form of government, and of its going into disuse. We are to look, therefore, to the common law of England for the definition of this offence, (libel) which has become our common law, in consequence of a provision in our constitution, that all laws which had been adopted, used and approved in the province, colony, or state of Massachusetts Bay, and usually practised on in the courts of law, should remain and be in full force, until altered or repealed by the legislature, such parts only excepted as should be repugnant to the rights and liberties contained in the constitution. The law of libel, which had been adopted and practised on before the revolution, by this provision, became the law of the land, as did most of the common and statute law of England, which existed before the migration of our ancestors into this country, and many of our dearest and most valuable rights depend, for their security, upon this common law of England, as it has been usually styled, but which now ought to be called, as far as we have adopted it, the common law of Massachusetts." *Boston Pat. Dec.* 28, 1811.

of England, nor inconsistent with the charter granted by their majesties, William and Mary, were ordered to remain and continue in full force.”¹ Under their construction of the charter, the provincial legislature and the courts of justice used and adopted, in practice, such of the laws of England, whether common or statute, which applied to their condition, without any formal enactment, considering the same as their right and inheritance, as British subjects.

At the emigration of the settlers of New England, and from time immemorial prior to that event, the common law of England punished, as offences against the state, every libel made either against “a private man, or against a magistrate, or public person. If it be against a private man,” says Lord Coke, “it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred or society, to revenge, and so tends, *per consequens*, to quarrels, and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience. If it be against a magistrate or other public person, it is a greater offence; for it concerns not only the breach of the peace, but also the scandal of government.—Although the private man or magistrate be dead, at the time of the making of the libel, yet it is punishable; for in the one case, it stirs up others of the same family, blood, or society, to revenge, and to break the peace; and in the other, the libeller traduces and slanders the state and government, which dies not.—It is not material whether the libel be true, or whether the party against whom it is made, be of good or ill-fame; for in a settled state of government, the party grieved ought to complain for every injury done him, in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise.”²

Those who deny that the English law of libel was ever

¹ Anc. Chart, ed. 1814, p. 213.

² The case *de Libellis Famosis*, 3 Jac. I. 3 Co. 125.

adopted in practice, in the colony and province, may well be called on for proof of that assertion. The people claimed the whole common law as their right; why should this have been rejected? From the local laws which I have already quoted, it is apparent, that false and malicious libels, published with intent to defame, were regarded as criminal acts. We learn, however, from various sources, the opinions of the people and the government, at different periods, on this subject. In the *Life of Dr. Franklin*, written by himself, he mentions a fact, which occurred in Boston, while he was an apprentice to his brother, James Franklin, the printer and publisher of the newspaper, called the "*New England Courant*." "An article inserted in our paper, upon some political subject, which I have now forgotten, gave offence to the Assembly. My brother was taken into custody, censured, and ordered into confinement for a month, because, as I presume, he would not discover the author. I was also taken up, and examined before the council; but though I gave them no satisfaction, they contented themselves with reprimanding, and then dismissing me; considering me probably as bound, in quality of apprentice, to keep my master's secrets. — My brother's enlargement, was accompanied with an arbitrary order from the house of assembly, that James Franklin should no longer print the newspaper, entitled the '*New England Courant*.'" With this order, severe as it was, he was obliged to comply, and the paper was printed, for some time, in the name of Benjamin Franklin himself, although he was only sixteen years old. This occurred about the year 1722.

In the year 1754, while a bill, which contained some odious features, was before the provincial legislature, for granting an excise upon wines and other spirituous liquors, the people were excited against it by many publications. "But the publication of most celebrity," says Judge Minot, "was a pamphlet entitled '*the Monster of Monsters*,' being a witty, sarcastic, and pointed caricature of those members of the two houses, who were mate-

rially concerned in advancing or opposing the bill, under the fiction of two assemblies of ladies, among whom the monster in question was introduced. When the general court met, the house of representatives resolved that this pamphlet was a false and scandalous libel, reflecting upon the proceedings of that house in general, and on many worthy members in particular, in breach of the privileges thereof, and ordered it to be burnt by the hands of the common hangman. It was then resolved, that Daniel Fowle, the printer, should be taken into custody, who, after examination, was committed to the common jail in Boston. Joseph Russel, his apprentice, Zachariah Fowle, a printer, and Royal Tyler, the supposed author, were also taken into custody. Mr. Tyler, when brought before the house, moved for counsel, which was refused; and upon his declining to reply further, than that he was not obliged to accuse himself, he was ordered to remain in custody, and without bail. The next day, the house resolved, that Daniel Fowle was concerned in publishing the pamphlet; and the day after, Mr. Tyler, pleading the distressed circumstances of his family, was permitted to return to it, upon his giving his word of honor to the house, that he would be forthcoming." After being confined in jail for five days, Mr. Fowle was brought before the house, reprimanded for publishing the libel, and ordered to be discharged, upon his paying costs. Afterwards, Fowle "commenced an action against the speaker and messenger of the house of representatives, and the jailor, as Mr. Tyler did against the messenger alone. The new house, by a majority of two-thirds of the members, voted that this power of committing, had often and for a long time been exercised by many former houses; that the house of representatives were the indisputable judges of any breach of their privileges, and had an authority to arrest, commit, and examine for such breaches, not only their own members, but others; that it was the indispensable duty of the speaker of the said house to issue his warrants, according to the orders given, and of the messenger and keeper of the

Commonwealth v. Whitmarsh.

jail, to execute them ; and that these suits were an attempt against the rights of the people of the government, in the authority of that house to commit for a contempt to their representative body, to frustrate all effect of this authority, and to introduce disorder and confusion ; and that, therefore, the officers who issued and executed the warrants, should be defended in the action." The event of the process was, that the superior court of judicature gave judgment in favor of the defendants, considering their plea in bar good, and that Fowle should pay costs of court.¹

Governor Hutchinson, in the third volume of his History of Massachusetts Bay, mentions a fact, which occurred in the year 1768, during the administration of Sir Francis Bernard. " While the assembly was sitting, a most abusive piece against the governor was published in the Boston Gazette. The council took notice of it, and advised the governor to lay it before the two houses by a message. The council, in their address, pronounced it a scandalous libel upon the governor. The house was of opinion, that, as no particular person, public or private, was named, it could not affect the majesty of the king, the dignity of the government, the honor of the general court, nor the true interest of the province ; and that it was not proper to take any notice of it. The superior court was held, soon

¹ Sup. Court Records, February term, 1757. 1 Minot's History of Massachusetts, c. 9. George Richards Minot, was, at the time of his death, in January, 1802, judge of the municipal court of the town of Boston, and judge of probate for the county of Suffolk. The Hon. John Q. Adams, in an address to the Massachusetts Charitable Fire Society, at their following anniversary in May, paid an eloquent tribute to his memory. Though not distinguished as an advocate at the bar, he possessed an admirable judgment, and excellent learning, both professional and general. He died in the forty-second year of his age, without having completed his History of Massachusetts ; but he had acquired a high reputation by his writings, particularly by his History of the insurrection in Massachusetts, in 1786, for which he was styled the American Sallust. He died in the midst of his usefulness and honors, leaving in the memory of his friends, and in the estimation of the community, a reputation for worth, modesty, scholarship, and talents, rarely excelled.

after, in the county of Suffolk. The chief justice, in his charge to the grand jury, mentioned this libel as an offence, of which, unless they departed from their oaths, they could not avoid making presentment. The attorney-general laid a bill before them, upon which they returned 'ignoramus,' and thus," says the historian, "gave a sanction to libels, which multiplied more than ever."¹ In a part of their answer to the governor, the house say, "should the proper bounds of the liberty of the press at any time be transgressed, to the prejudice of individuals, or the public, it is our opinion, at present, that provision is already made for the punishment of offenders in the common course of the law."²

In a letter, sent by the council of the province, to William Bollan, Esq. the agent in England, dated Oct. 30, 1770, they remark on the subject of libels: "If such publications have taken place here, and no notice has been taken of them, where doth the fault lie? Surely on him who acts for the king, as his attorney, in his not drawing indictments, summoning witnesses in support of the same, and then laying the whole before the grand jury; and if he hath not done it, the fault is not in the council, unless they had endeavored to prevent it, which is very far from being the case, as will presently be shown."³

But the grand jury, at a subsequent period, were more ready to find bills for this offence. It serves, however, to show, that the law of libel was an acknowledged part of the common law of the province, however it might be used or abused, in warm party times, to effect a political purpose. "At the superior court for the county of Suffolk, in 1769, the grand jury found bills of indictment against Sir Francis Bernard, then governor of the province, though absent with leave, Thomas Gage, Esq.

¹ 3 Hutch. Hist. 186.

² See Mass. State Papers, collected by Secretary Bradford, and published by Russell and Gardner, in the year 1808, p. 119.

³ Mass. State Papers, 275.

Commonwealth v. Whitmarsh.

the commander-in-chief of all his majesty's forces on the continent, the five commissioners of his majesty's customs, the collector and comptroller for the port of Boston, for writing certain letters to the secretary of state, and other the king's ministers, and therein slandering the inhabitants of the town of Boston, and of the province of Massachusetts Bay. The attorney-general had refused to draw the bills, when requested by the grand jury, and they either drew them themselves, or employed some other lawyer, unknown, and presented them to the court." ¹ The historian says, "that the court thought it advisable to take no public notice of this irregular, wanton proceeding. It had been the practice for the clerk, without any special order, to issue a warrant of commitment, or a summons, according to the nature of the offence, returnable to the next term, where the person charged was not in custody. The court so far interposed, as to give private orders to the clerk, to issue no summons, upon these bills, without special direction." It is stated, in a note, that the attorney-general, afterwards, in consequence of the king's order to the lieutenant-governor, entered, in behalf of the crown, a *nolle prosequi*, upon each of these indictments.²

It must be left to the more diligent student, to search for farther precedents in the records of the superior court, prior to the adoption of the constitution. Whenever the legislature act against individuals for a contempt to their body, it is in their judicial character, and serves as a declaration of what they con-

¹ 3 Hutch. Hist. 262.

² For thirty years prior to the period, in which Governor Hutchinson took a decided part against his native province, and which has rendered his name so odious to Americans, he was one of its own most valued citizens, and he enjoyed the highest public estimation. He discharged, with great fidelity, many important offices, and none with more dignity and felicity, than that of chief justice of the superior court. The third volume of his History of Massachusetts, brings down the series of events to the year 1774, when he took his departure from America. After his death, this volume was published at the request, and under the auspices of the Massachusetts Historical Society. It is written with great ability and candor, and will perpetuate his reputation as a historian.

sider to be the law. But enough appears from these historical fragments, to prove that libels were considered as offences against the common law of the state. If any doubt, however, should remain on this subject, the practice of the supreme judicial court, since the adoption of the constitution, would abundantly prove the fact.¹

III. Whether the legislature, and the highest judicial tribunal of the commonwealth, or either of those branches of the government, have, since the adoption of the constitution, recognized libel as an indictable offence?

The trial of Edmund Freeman, for the offence of libel, was the first known to me, which occurred in this commonwealth, after the adoption of the constitution. It was before the supreme judicial court, in Suffolk, February, 1791. The court consisted of Nathaniel P. Sargeant, C. J., Francis Dana, who, in 1792, was appointed chief justice, Robert Treat Paine, Increase Sumner, who, in 1797, was elected governor of the commonwealth, and Nathan Cushing, justices. Sargeant, Paine, and Sumner, were members of the convention, which framed the constitution, in 1780. James Sullivan, the attorney-general, was also a member of that convention, and was, in the year 1807, chosen governor of the commonwealth. The defence was conducted by Harrison G. Otis and Rufus G. Amory, Esqs. The libel was upon John Gardiner, Esq. barrister at law, justice of the peace, member of the house of representatives, and engaged, at the time, in some legislative attempt to reform the practice of the law. The trial, from the nature of the case, and the eminent talents engaged in it, excited a great interest. Sumner, J., in his address to the jury, defined the offence of

¹ See the case of *John Peter Zenger*, a printer, who was tried in New York, for a libel, in the year 1735. — (17 State Trials, 675, ed. of Howell, and 1 Chandler's Criminal Trials, 157.) There was not in that case, which was celebrated throughout the colonies and in Great Britain, for the ability with which the defence was conducted, any question raised, whether libel was an offence which was punishable by indictment, or information in the courts of that colony.

Commonwealth v. Whitmarsh.

the commander-in-chief of all his majesty's forces of
 ment, the five commissioners of his majesty's of
 lector and comptroller for the port of Boston,
 letters to the secretary of state, and other th
 and therein slandering the inhabitants of
 and of the province of Massachusetts
 general had refused to draw the bills,
 grand jury, and they either drew the
 some other lawyer, unknown, and p
 The historian says, "that the cov
 no public notice of this irregul
 been the practice for the cle
 issue a warrant of commitm
 nature of the offence, ret
 person charged was not i
 as to give private order,

upon these bills, with
 note, that the attor
 king's order to th
 crown, a *nolle*

It must be
 farther prec
 the adopt
 against
 judic

words: "the liberty of the press is essential to the security of
 freedom in a state; it ought not, therefore, to be restrained in
 this commonwealth." (Art. 16.) This paragraph in our con-
 stitution is the boast of every good citizen. The security of
 freedom being the subject-matter of this article, there can be
 no doubt but that the citizen has a right to publish his sentiments
 upon all political, as well as moral and literary subjects, and to
 point out to the public such men as he thinks most suitable to
 be elected into office, and in many other ways to express his

sentiments with freedom, provided he keeps within the bounds of truth ; for freedom can never be supported by falsehood. In every instance, where falsehood has been propagated of the government or its officers, it has been found to undermine the very principles of freedom, and strikes at the foundation of the public peace and happiness. But there is a material difference between the *liberty* and the *licentiousness* of the press. If a man publishes anything to the injury of the public or individuals, he must answer for it according to the laws of his country. This article, it appears to me, will not by any means excuse or justify a libellous publication."

The following passage, in the address of Dana, J., to the jury, is of particular value, as it intimates an opinion, on the sixteenth article of the bill of rights. "Something has been objected, also, to the doctrine of libels, namely, that the truth of the charges cannot be given in evidence, because it is no justification, if it is true ; indictments for libels being founded upon this principle, that the provocation and not the falsity, is the thing to be punished criminally. Though this is undoubtedly the rule of law, as established by the courts in Great Britain, yet perhaps the courts here may lay down a different principle, and admit the truth of the charges, contained in a libel, to amount to a complete justification, as it doth in a civil action upon a libel. But this must depend upon the construction they may give to the article in our bill of rights, relative to the liberty of the press, which declares, 'that it ought not to be restrained within this commonwealth.' But I desire it may be noticed, that I give no opinion on this new point, now, because it is wholly unnecessary on this trial ; as there has not been even a motion made by the defendant's counsel, that they might be admitted to prove the truth of any one charge. If there had been, the court must have decided the point." The chief justice, in his address to the jury, described the offence of libel in the language of Hawkins, and instructed them, in forming their judgment, to see if the publication com-

plained of contained such matter, as tended to expose Mr. Gardiner to public hatred, contempt, or ridicule. "I do not take it," he said, "that it is necessary, in order to make any writing a libel, that it should contain the charge of some crime which is indictable; for there are some other charges not indictable, that will have the same tendency to a breach of the peace, as if they were so—and expose a person to public hatred, contempt, and ridicule, as much as any charges whatever." The judges were unanimous in the opinion, that libel was an offence against the law of this commonwealth; and they drew their definition and illustration of this offence, from the English authorities.

It was made a point in the defence, that the innuendoes or explanations, charged in the indictment, were not supported by the publication. It was also contended, that the defendant was licensed by Mr. Gardiner, to publish any remarks on his conduct in the legislature, and that this license negated the pretence of malice, which is of the essence of libel. The defence was successful, and the trial resulted in Freeman's acquittal.¹ The eminent men who were engaged in this trial, on the bench and at the bar, must have known the common law of the commonwealth, prior to the adoption of the constitution, and probably understood the meaning of that instrument as well as most of us at the present day. If libel was not known at that time, as an offence, the counsel for the defendant must have been singularly unfaithful to their client, and the judges to the law, for omitting to rest the defence on that ground.

At the supreme judicial court in Suffolk, February term, 1799, Thomas Adams and Abijah Adams, proprietors and publishers of the Independent Chronicle, were indicted for a seditious libel, against the legislature of the commonwealth, relative to their proceedings on certain resolutions of the state of Virginia. Abijah Adams was tried and convicted of the offence,

¹ See Massachusetts Magazine for March, April and May, 1791.

and sentenced to thirty days' imprisonment in the common jail, to recognize in five hundred dollars to keep the peace, and be of good behavior for one year, and to pay costs of prosecution.¹

¹ The following sketch of Chief Justice Dana's observations, prior to passing sentence upon Mr. Adams, taken from "The Gazette," a newspaper, printed in Portland, April 8, 1799, will show the views of the supreme court at that time, relating to the liberty of the press and the common law. "After a long and fair trial, you have been convicted by an upright and impartial jury, of publishing a false, scandalous, and malicious libel, against the legislature of the commonwealth. The subject of the libel is the proceedings of the legislature, disapproving of certain resolutions of the state of Virginia, officially communicated to them, and indeed to all the other legislatures of the Union, requesting their concurrence therein. Touching these resolutions, it is enough to observe, generally, that they charge congress with having *violated the national constitution, and invaded the sovereign rights of the particular states, the freedom of speech, and the liberty of the press, by passing the sedition and alien acts* — and also, *assert a right to judge of the constitutionality of laws enacted by congress, to be vested in the legislatures of the several states*. Thus attempting to establish the monstrous positions, that there exists within the United States, as many supreme, independent, disconnected *judicial* authorities, as there are states in the Union, *having a right to determine all questions touching the powers entrusted to the national legislature, by the national compact or constitution* : — and that this right is vested in that branch of the state governments, which all, or nearly all, the constitutions of the several states *expressly forbid* to exercise any *judicial* authority. The legislature of Virginia have indeed not only claimed, but actually exercised this assumed power, and gone on to declare the acts in question unconstitutional, and therefore null and void ; and absolved their citizens from all obedience to them, and charged their judicial authorities to act accordingly, if I rightly remember. In their proceedings respecting the resolutions of Virginia, our legislature say, 'they cannot admit the right of a state legislature to denounce the administration of that (the federal) government, to which the people themselves by solemn compact have exclusively committed their national concerns — that the decision of all cases in law and equity, arising under the constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States : — that the people, in that solemn compact, which is declared to be the law of the land, have not constituted the state legislatures the judges of the acts or measures of the federal government : — that they do not themselves *claim* the right, nor *admit* the authority of any of the state governments, to *decide* upon the *constitutionality* of the acts of the federal government : — that they consider the acts of congress, called the alien and sedition acts, not only constitutional, but expedient and necessary : — that the genuine liberty of speech and of the press, is

Commonwealth v. Whitmarsh.

At the August term of the same court, in Suffolk, 1801, John S. Lillie, the editor of the Constitutional Telegraph, a newspaper, printed in Boston, was convicted of a malicious libel upon

the liberty to utter and publish *the truth*; but the constitutional right of the citizen to utter and publish the truth, is not to be confounded with a licentiousness in speaking and writing, that is only employed in propagating falsehood and slander; — that the freedom of the press is a security for the *rational* use, and not the *abuse* of the press: of which the courts, the juries, and the people will judge; that they consider the sedition act to be wise and necessary, as an audacious and unprincipled spirit of falsehood and abuse had been too long unremittingly exerted, for the purpose of *perverting* public opinion, and threatened to undermine the whole fabric of government.

Such are the sentiments expressed by our legislature, which met the approbation of the senate (with one dissentient only) and of a great majority of the house of representatives. Sentiments which will bear the severest scrutiny, when "*truth is its guide, and liberty its object.*" Yet these sentiments drew forth this libel stated in the indictment; in which those members of the legislature, who voted for those proceedings, are charged in effect with having violated the oath of allegiance to the commonwealth, and invited the Deity to witness a falsehood — are compared to the rebellious and fallen angels — denominated apostates, with their faces in the dust, and declaring, "While the name of the single dissentient in the senate will be handed down to the latest generations of freemen, with high respect and gratitude, the names of *such*, (meaning the majorities) who have aimed a *death-wound* to the constitution of the United States, will rot above ground, and be unsavory to the nostrils of every lover of republican freedom." All this indecent and outrageous calumny is poured forth upon them, because, as the author of it asserts, they "*disclaim* for themselves, as members of the legislature, and *deny* to all other states in the Union, any right to decide on the constitutionality of any acts of congress." If they erred in this opinion of judgment, they have already been followed by the legislatures of several states, and will probably be so, by a great majority of them, as they have an opportunity to declare their sentiments upon the same subject. But, however censurable the libel may be in itself, it cannot be more dangerous to the public tranquillity, than the propagation of the principles which have been advanced by your counsel in your defence, and through the channel of the same press, as well before as since the indictment was found, namely: that the makers, printers, or publishers of any libel, however false, scandalous, seditious, or treasonable in its nature, *which issues through the press*, cannot in any manner be questioned in a court of law; because the constitution of the commonwealth declares, "the liberty of the press is essential to the security of freedom in a state, it ought not, therefore, to be *restrained* in this commonwealth."

That the indictment being grounded not on any statute, but the common

the Chief Justice Dana, charging him with bribery and corruption in his office. The defendant demurred in law to the indictment, and his defence was conducted by George Blake, Esq.

law of England only, ought not to be supported, as that law had now no force or operation within the United States ; that the common law was inconsistent with those *republican* principles contemplated and avowed in our constitution, and inapplicable to the genius and nature of our government. Such doctrines were unheard of among us till of late. Those who have urged them would deprive us of what we have long been taught to cherish as our birth-right and best inheritance. Indeed, without the aid of the common law, every lawyer must know it would be impracticable to proceed in the distribution of justice, civil or criminal. So sensible were the citizens of the United States of the truth of this observation, that when forming their constitutions, they carefully, in almost all of them, secured its operation so far forth as their local condition admitted, unless repugnant to their constitutions. The constitution of this commonwealth declares "All laws which have *heretofore* been adopted, used and approved, in the province, colony, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature, such parts only excepted as are repugnant to the rights and liberties contained in this constitution." *Chap. 6, Art. 6.*

New York. "Such parts of the common law of England and of the statute law of England and Great Britain, &c. as together did form the law of said colony, on the 19th of April, 1775, shall be and continue the law of the state, subject to such alterations, &c. as the legislature shall make, &c." *Const. Art. 35.*

New Jersey. "The common law of England, as well as such of the statute laws, as have been heretofore practised in this colony, shall still remain in force, until they shall be altered by a future law of the legislature, such parts only excepted as are repugnant to the rights and privileges contained in this charter." *Const. A. 22.*

Pennsylvania. "The *penal* laws, as heretofore used, shall be *reformed* by the legislature of this state as soon as may be, and punishments made in *some cases*, less sanguinary, and in general more appropriate to the crimes." *Const. Art. 38.*

Delaware. "The common law of England, as well as so much of the statute law, as have been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered or repealed by a future law of the legislature, such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights." *Const. Art. 25.*

Maryland. "The inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first

Commonwealth v. Whitmarsh.

The court continued the case to the February term, in 1802, to give to the defendant an opportunity to divulge the author. At that term, he produced the original writing, and an

emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great Britain, and have been introduced, used and practised by the courts of law or equity ; subject, nevertheless, to the revision of, and amendment or repeal by, the legislature of this state." *Decl. of Rights, Art. 3.*

Virginia. In the constitution of Virginia, made in 1776, I do not find any declaration respecting the common law of England ; but it seems a committee, for the revision of the laws of that state, made a report in June, 1779, that that work had been performed by three of them, namely, Mr. Jefferson, the now vice-president of the United States, Mr. Pendleton, now president of the court of appeals, and Mr. Wyeth, now chancellor of the state. "The plan of the revisal was this, (says Mr. Jefferson) *the common law of England*, by which is meant, that part of the English law, which was anterior to the date of the oldest statutes extant, *is made the basis of the work.* It was thought dangerous to attempt to reduce it to a text. It was therefore left to be collected from the usual monuments of it, &c." *See his Notes on Virginia*, 146. Further objections were made against the constitution of the United States, in the convention of Virginia, because it had not by an *express* provision adopted the common law. It was answered that had it been adopted by the constitution, it would have been *immutable*, but being omitted it might now be changed. — *See Evans's Address to the Virginians*, p. 45 : *cites the debates of the Convention*, vol. 3, p. 38, 55.

Thus it is beyond all question, that the citizens of America have anxiously secured to themselves the full operation of the common law of England, so far forth as it is applicable to our local condition, and not repugnant to their respective constitutions. Let every one now judge how unfounded are the novel disorganizing doctrines, "that the common law of England, (under the restrictions stated as above) has no force and operation within the United States — that it is inconsistent with those republican principles contemplated and avowed in our constitution, and inapplicable to the genius and nature of our government." If our constitution were *silent* respecting the common law of England ; yet might I challenge the soundest lawyer to show how we could carry into effect that constitution, or many of our acts made under it, without a recurrence to that common law. We have, for example, a statute against treason, by which it is enacted that a citizen of this state, who shall levy war against it, shall be deemed guilty of that offence ; but to find what facts may amount to that levying of war, we must resort to the law of England, from which the expressions are borrowed. We have acts against murder and burglary ; but those terms are technical, the acts in which they are used do not

indictment was returned against John Vinall, Esq. as the author. Mr. Vinall was defended, on his trial, by H. G. Otis, and John Q. Adams, Esqrs. But the government failed to sat-

define them, and we go to the common law decisions for their legal import. But it would be tedious to state all the examples which occur. For the sake of many present, who were not at the trial, I have made these observations upon a question that I never expected to hear litigated. In regard to the other question, upon the article of our constitution, which will not suffer the press to be restrained, I believe *that* is well understood by all who *wish* to understand it. Our press is subject to no *licenser*. It is not required here that any appointed officer shall put his *imprimatur* upon a composition before it be printed. A citizen may print what he pleases; but if it be afterwards found false or libellous he must take the consequence. As to you, Mr. Adams, who are more particularly interested upon this occasion, I have to say that the court have deferred their sentence against you, until this late hour of the term, in hopes you would have exposed the author of the libel which you published. It is not the wish of the court to let a printer suffer, when an author can be found. But if a printer will serve an author, who has not magnanimity enough to come forward and save him in the day of trouble, he must blame himself for his ill-placed confidence. As matters now are, you are the only person to whom the public can look for retribution. The court has, however, considered every circumstance of alleviation which relates to *you*, not forgetting even your poor state of health. And in the sentence which the clerk is now to read, we have aimed at giving judgment in mercy."

Other of the states took care, in making their constitutions, to secure to their citizens the use of the common and statute laws, to which they were accustomed. The following extracts are from a work, entitled "The Constitutions of the United States of America," &c. published by Evert Duyckink, in New York, 1813.

New Hampshire. "All the laws which have heretofore been adopted, used and approved, in the province, colony, or state of New Hampshire, and usually practised on in the courts of law, shall remain and be in full force until altered and repealed by the legislature; such parts thereof only excepted, as are repugnant to the rights and liberties contained in this constitution." — *Const. N. H.*

Rhode Island. In the charter of Charles II. to the inhabitants of Rhode Island, among other rights, they were empowered "from time to time, to make, ordain, constitute, and repeal, such laws, statutes, orders and ordinances, forms of government and magistracy, as to them shall seem meet; so as such laws, ordinances, and constitutions, so made, be not contrary and repugnant unto, but (as near as may be) agreeable to the laws of this, our realm of England, considering the nature and constitution of the place, and people there."

the commander-in-chief of all his majesty's forces on the continent, the five commissioners of his majesty's customs, the collector and comptroller for the port of Boston, for writing certain letters to the secretary of state, and other the king's ministers, and therein slandering the inhabitants of the town of Boston, and of the province of Massachusetts Bay. The attorney-general had refused to draw the bills, when requested by the grand jury, and they either drew them themselves, or employed some other lawyer, unknown, and presented them to the court."¹ The historian says, "that the court thought it advisable to take no public notice of this irregular, wanton proceeding. It had been the practice for the clerk, without any special order, to issue a warrant of commitment, or a summons, according to the nature of the offence, returnable to the next term, where the person charged was not in custody. The court so far interposed, as to give private orders to the clerk, to issue no summons, upon these bills, without special direction." It is stated, in a note, that the attorney-general, afterwards, in consequence of the king's order to the lieutenant-governor, entered, in behalf of the crown, a *nolle prosequi*, upon each of these indictments.²

It must be left to the more diligent student, to search for farther precedents in the records of the superior court, prior to the adoption of the constitution. Whenever the legislature act against individuals for a contempt to their body, it is in their judicial character, and serves as a declaration of what they con-

¹ 3 Hutch. Hist. 262.

² For thirty years prior to the period, in which Governor Hutchinson took a decided part against his native province, and which has rendered his name so odious to Americans, he was one of its own most valued citizens, and he enjoyed the highest public estimation. He discharged, with great fidelity, many important offices, and none with more dignity and felicity, than that of chief justice of the superior court. The third volume of his History of Massachusetts, brings down the series of events to the year 1774, when he took his departure from America. After his death, this volume was published at the request, and under the auspices of the Massachusetts Historical Society. It is written with great ability and candor, and will perpetuate his reputation as a historian.

sider to be the law. But enough appears from these historical fragments, to prove that libels were considered as offences against the common law of the state. If any doubt, however, should remain on this subject, the practice of the supreme judicial court, since the adoption of the constitution, would abundantly prove the fact.¹

III. Whether the legislature, and the highest judicial tribunal of the commonwealth, or either of those branches of the government, have, since the adoption of the constitution, recognized libel as an indictable offence?

The trial of Edmund Freeman, for the offence of libel, was the first known to me, which occurred in this commonwealth, after the adoption of the constitution. It was before the supreme judicial court, in Suffolk, February, 1791. The court consisted of Nathaniel P. Sargeant, C. J., Francis Dana, who, in 1792, was appointed chief justice, Robert Treat Paine, Increase Sumner, who, in 1797, was elected governor of the commonwealth, and Nathan Cushing, justices. Sargeant, Paine, and Sumner, were members of the convention, which framed the constitution, in 1780. James Sullivan, the attorney-general, was also a member of that convention, and was, in the year 1807, chosen governor of the commonwealth. The defence was conducted by Harrison G. Otis and Rufus G. Amory, Esqs. The libel was upon John Gardiner, Esq. barrister at law, justice of the peace, member of the house of representatives, and engaged, at the time, in some legislative attempt to reform the practice of the law. The trial, from the nature of the case, and the eminent talents engaged in it, excited a great interest. Sumner, J., in his address to the jury, defined the offence of

¹ See the case of *John Peter Zenger*, a printer, who was tried in New York, for a libel, in the year 1735. — (17 State Trials, 675, ed. of Howell, and 1 Chandler's Criminal Trials, 157.) There was not in that case, which was celebrated throughout the colonies and in Great Britain, for the ability with which the defence was conducted, any question raised, whether libel was an offence which was punishable by indictment, or information in the courts of that colony.

Commonwealth v. Whitmarsh.

the commander-in-chief of all his majesty's forces on the continent, the five commissioners of his majesty's customs, the collector and comptroller for the port of Boston, for writing certain letters to the secretary of state, and other the king's ministers, and therein slandering the inhabitants of the town of Boston, and of the province of Massachusetts Bay. The attorney-general had refused to draw the bills, when requested by the grand jury, and they either drew them themselves, or employed some other lawyer, unknown, and presented them to the court."¹ The historian says, "that the court thought it advisable to take no public notice of this irregular, wanton proceeding. It had been the practice for the clerk, without any special order, to issue a warrant of commitment, or a summons, according to the nature of the offence, returnable to the next term, where the person charged was not in custody. The court so far interposed, as to give private orders to the clerk, to issue no summons, upon these bills, without special direction." It is stated, in a note, that the attorney-general, afterwards, in consequence of the king's order to the lieutenant-governor, entered, in behalf of the crown, a *nolle prosequi*, upon each of these indictments.²

It must be left to the more diligent student, to search for farther precedents in the records of the superior court, prior to the adoption of the constitution. Whenever the legislature act against individuals for a contempt to their body, it is in their judicial character, and serves as a declaration of what they con-

¹ 3 Hutch. Hist. 262.

² For thirty years prior to the period, in which Governor Hutchinson took a decided part against his native province, and which has rendered his name so odious to Americans, he was one of its own most valued citizens, and he enjoyed the highest public estimation. He discharged, with great fidelity, many important offices, and none with more dignity and felicity, than that of chief justice of the superior court. The third volume of his History of Massachusetts, brings down the series of events to the year 1774, when he took his departure from America. After his death, this volume was published at the request, and under the auspices of the Massachusetts Historical Society. It is written with great ability and candor, and will perpetuate his reputation as a historian.

sider to be the law. But enough appears from these historical fragments, to prove that libels were considered as offences against the common law of the state. If any doubt, however, should remain on this subject, the practice of the supreme judicial court, since the adoption of the constitution, would abundantly prove the fact.¹

III. Whether the legislature, and the highest judicial tribunal of the commonwealth, or either of those branches of the government, have, since the adoption of the constitution, recognized libel as an indictable offence?

The trial of Edmund Freeman, for the offence of libel, was the first known to me, which occurred in this commonwealth, after the adoption of the constitution. It was before the supreme judicial court, in Suffolk, February, 1791. The court consisted of Nathaniel P. Sargeant, C. J., Francis Dana, who, in 1792, was appointed chief justice, Robert Treat Paine, Increase Sumner, who, in 1797, was elected governor of the commonwealth, and Nathan Cushing, justices. Sargeant, Paine, and Sumner, were members of the convention, which framed the constitution, in 1780. James Sullivan, the attorney-general, was also a member of that convention, and was, in the year 1807, chosen governor of the commonwealth. The defence was conducted by Harrison G. Otis and Rufus G. Amory, Esqs. The libel was upon John Gardiner, Esq. barrister at law, justice of the peace, member of the house of representatives, and engaged, at the time, in some legislative attempt to reform the practice of the law. The trial, from the nature of the case, and the eminent talents engaged in it, excited a great interest. Sumner, J., in his address to the jury, defined the offence of

¹ See the case of *John Peter Zenger*, a printer, who was tried in New York, for a libel, in the year 1735. — (17 State Trials, 675, ed. of Howell, and 1 Chandler's Criminal Trials, 157.) 'There was not in that case, which was celebrated throughout the colonies and in Great Britain, for the ability with which the defence was conducted, any question raised, whether libel was an offence which was punishable by indictment, or information in the courts of that colony.'

Commonwealth v. Whitmarsh.

sidered, in a well regulated society, the wrong done to the individual citizen, whether affecting his life, liberty, property or character. If the life of a citizen is taken by an act of unlawful violence, if he is unjustly assaulted and deprived of his liberty ; if he is despoiled of his property, or cruelly and falsely defamed in his character ; these all are justly considered wrongs done to the state, which a good government is bound to restrain.

But all the rights and privileges, secured to the subjects of the state, by the constitution, are, we have seen, to have a reasonable construction ; so that each citizen may enjoy his own, without encroaching on those of his neighbor. What is meant by the liberty of the press ; and why is it essential to the security of freedom, according to the sixteenth article of the bill of rights ? The essential liberty of the press consists in the right, which every person has, to write and publish what he pleases, without any previous supervision, and on his own responsibility. But he is answerable for the abuse of this liberty, as for any other voluntary act ; and this responsibility necessarily arises from the nature of his social relations. By the liberty of the press, is intended the right to print and publish among the citizens, the truth respecting men and things, on all fitting occasions, where it will be useful to be known ; and, therefore, it ought not to be restrained, because such liberty is essential to freedom. I think that this was the meaning of this article of the constitution ; that it has been so construed by the legislature, and by our highest tribunal of justice ; and that it is the law of the land at this time. If the liberty of the press includes more than this, I ask, how much more ? Every right and every liberty has its limits, which may be defined. Is it essential to the liberty of the press, that you should have right to publish with impunity, falsehoods, or even unnecessary and malicious truth, on every occasion, public or private ; on government, religion, or morals ; respecting public officers or private citizens, whatever ill blood and confusion it may produce, and however inconvenient and mischievous it may be to the public, or injurious to families or individuals ? I deny that this is the

ments with freedom, provided he keeps within the bounds of freedom can never be supported by falsehood. In instance, where falsehood has been propagated of the government or its officers, it has been found to undermine the very principles of freedom, and strikes at the foundation of the public peace and happiness. But there is a material difference between the *liberty* and the *licentiousness* of the press. If a man publishes anything to the injury of the public or individuals, he must answer for it according to the laws of his country. This article, it appears to me, will not by any means excuse or justify a libellous publication."

The following passage, in the address of Dana, J., to the jury, is of particular value, as it intimates an opinion, on the sixteenth article of the bill of rights. "Something has been objected, also, to the doctrine of libels, namely, that the truth of the charges cannot be given in evidence, because it is no justification, if it is true; indictments for libels being founded upon this principle, that the provocation and not the falsity, is the thing to be punished criminally. Though this is undoubtedly the rule of law, as established by the courts in Great Britain, yet perhaps the courts here may lay down a different principle, and admit the truth of the charges, contained in a libel, to amount to a complete justification, as it doth in a civil action upon a libel. But this must depend upon the construction they may give to the article in our bill of rights, relative to the liberty of the press, which declares, 'that it ought not to be restrained within this commonwealth.' But I desire it may be noticed, that I give no opinion on this new point, now, because it is wholly unnecessary on this trial; as there has not been even a motion made by the defendant's counsel, that they might be admitted to prove the truth of any one charge. If there had been, the court must have decided the point." The chief justice, in his address to the jury, described the offence of libel in the language of Hawkins, and instructed them, in forming their judgment, to see if the publication com-

(Art. XI.) But the injured man is now told, by learned counsel, that the injuries done to his fame, are nothing to the public; that the courts are open to him; and that he may commence an action against the calumniator for damages. But all this must be done at his own expense and risk. He may not even arrest the person of the aggressor, unless he will first make oath that he believes that the defendant is about to depart beyond the jurisdiction of the court.¹ He must follow him from court to court, submitting to all the delays and vexations, which malice and ingenuity can devise. He must pay witnesses to attend in his behalf, and lawyers to plead his cause. If, at last, he should obtain a tardy declaration of justice, in his favor, and an execution for damages, he must yet levy it at his own expense and risk. If the offending party chooses, he may refuse to pay the debt, and be committed to the freedom of the whole city, still to enjoy all the liberty and impunity, which, perhaps, he may desire, and all encouragement to renew his slanders upon others. In all this, I confess, I do not see "a certain remedy." The injured citizen has been obliged to pay money, to lose time, and to submit to the evils of a painful litigation,² but without obtaining redress for past wrongs, or security against future injury. If this is all the compensation which the citizen is entitled to receive, under the constitution, for the injury which he has sustained from a false and malicious libel; it appears to me, that the remedy is an additional wrong, and that it is calculated to invite new injustice. Nothing more tends to raise the indignation of a virtuous community, than the circulation of scurrilous libels, written with the malicious intention to wound the feelings and reputation of good citizens, or to bring the laws into contempt. Such offence is *now* the less excusable, as both the constitution and laws permit the accused, on his trial, to prove the truth of the libellous matter, and to show "that it was published with good motives, and for justifiable ends."³

¹ Rev. St. c. 90, s. 111.

² Rev. St. c. 133, s. 6.

Commonwealth v. Riley and another.

This investigation has satisfied me, that false and malicious libels have ever been an offence against the common law of Massachusetts, and that the constitution regards them in the same light. Until the legislature shall alter the law, or the supreme judicial court shall pronounce it to be otherwise, it will be the rule of this court. The verdict of the jury having established the guilt of the defendant, in this case, it is the duty of the court to deny the motion, and to enter a judgment, according to law.¹

JANUARY TERM, 1837.

COMMONWEALTH v. PATRICK RILEY AND JOHN STEWART.

Where, in case of a mutual conflict between two persons, one of them declines any further combat, and retreats as far as he can with safety, and then, through necessity and to avoid immediate death, kills his adversary; it is justifiable homicide.

Where, in an affray, A. knocked down and beat B., and C., a bystander, believing that the life of B. was in danger, gave him a knife to defend himself, to prevent further mischief; it was held that C. was justified in giving B. the knife.

Parker, for the commonwealth.

Sprague and Robbins, for the defendants.

THACHER, J. The defendants are on trial for the offence of having killed one James McNally, in this city, on the 7th day of November last. It is denominated in law, manslaughter, which offence consists in the felonious and wilful, or voluntary killing of another, without malice aforethought, which would make the killing murder, but without necessity to justify the deed, or accident to excuse it. It is a case in which the public

¹ See Am. Jurist, vol. 16, p. 92.

Commonwealth v. Riley and another.

justice is interested ; a fellow-being has been suddenly, and by an act of violence, deprived of life ; and it concerns the whole community to make solemn inquiry into the transaction, and to punish the bloody actors, if they have violated the law. Both these defendants are on trial for this offence, and it is for you to investigate their respective share in the transaction, and to pass on the case of each as though they were severally on trial ; one may be guilty, and not the other, and both may be innocent.

The government must satisfy you that James McNally is dead, and that he came to his death in the manner which is charged in the indictment, before you can call on the defendants for their defence. That McNally is dead is clearly proved and not denied ; but that Riley killed McNally, is left to be inferred from the fact, that they were engaged in a conflict in the street, Riley being at the time armed with a knife, and it appeared immediately afterwards, that McNally had received a mortal wound in the abdomen, which, on the following day, terminated his life. But the evidence stops at a most interesting stage of the transaction. We are apprized of facts to this extent only : — After McNally had twice knocked Riley down in the street, and the latter had received from Stewart the knife, he passed from the street towards the sidewalk, followed by McNally. But while McNally followed Riley, and before he had reached him, Stewart begged McNally to go home. What was McNally's reply does not appear ; for the witness says, that McNally said something, which he did not hear, but ran to call the watch ; and when he returned shortly after, the affray was over. You will naturally inquire, and be desirous to know what occurred between these men on the sidewalk. Did McNally press upon Riley and knock him down ? Did Riley try to escape from his attack ? Did he retreat to the wall ? or was the attack so sudden and violent, and the danger so imminent, that no time was left for retreat ? Did both or either fall, and was the wound in the abdomen the effect of accident or design ? All these questions are important, and calculated ma-

terially to influence your minds. If the evidence has left this point in doubt, so that you cannot conscientiously say, that you believe that Riley voluntarily inflicted that mortal wound upon the deceased, you must pronounce a verdict of acquittal for both defendants. The learned counsel on both sides have argued the case, as though you would come to the conclusion, that this mortal wound was voluntarily inflicted by Riley. If that should be your conclusion, then the question will be, whether it was a justifiable or an excusable act on his part. It is wholly immaterial from whom the facts come, whether from witnesses for the government, or for the defendants. But you must first ascertain the facts, and then judge of them according to the law.

The parties had been amusing themselves at a game of cards, during which, something had occurred which gave offence to McNally; and when he first left the house, and was at the gate, he threatened to flog both Riley and Stewart. He went back into the house, and on his return to the gate, he repeated his threats. Stewart came out and said to him, "surely you will not think it worth while to whip so small a man as me." Soon after Riley came, and stepping to McNally, who stood opposite the gate, on the sidewalk, struck him, and immediately ran off across the street, and around a railing in front, on Bedford street. Stewart then interfered, and said to McNally, "go home McNally, and forgive Riley; he will not think of it in the morning." McNally replied, "the blow had no more effect on him than a blast of wind." Seeing Riley standing by the railing, he pursued him, and Riley ran some distance before McNally caught him. But Riley dodged him, and ran back to the witness, who still stood at the gate. McNally followed, and knocked him down, near to the sidewalk; and then it was, while Riley lay on the ground, and McNally was over him, that the witness says, "he saw McNally's foot going." Riley got up, and, saying it was too bad, walked off towards the middle of the street, when McNally followed, and knocked him down a

Commonwealth v. Riley and another.

second time. When Riley arose, Stewart went to him, and gave him a knife, and told him "to use his pleasure with it." This was done openly, and in presence of all. But Riley still went off towards the sidewalk, and McNally followed him. The witness says, that both before and after Riley had received the knife, he heard Stewart beg McNally, "for God's sake to go home." During the whole affray, he says, nothing led him to suppose that Riley and Stewart, or either of them, wanted to fight with McNally; and that, with the exception of the blow at the gate, the fight was all on the part of McNally. The witness saw no signs of anger and vengeance in Riley or Stewart; but, he says he expected, if McNally should again strike Riley, he might be tempted to defend himself with the knife, although he did not think that Riley meant to kill McNally. He therefore ran for the watch to prevent further mischief.

It was under these circumstances that the wound was given by Riley to McNally; and if it was done to defend his own life, and to save himself from great bodily harm, it was within the principles of self-defence, and justifiable in law. What is deemed in law the right of self-defence, is proper to be known by you. The principles are the result of long experience and careful consideration of wise men. The law trusts nothing to rash discretion; but requires her ministers, in all cases, to regard former precedents, made by judicial tribunals after mature deliberation. There are two kinds of self-defence; the one which is justifiable, and perfectly innocent and excusable; the other, which is in some measure blamable, and barely excusable. All the writers agree, says Sir Michael Foster, that there are cases in which a man may, without retreating, oppose force to force, even to the death. They all agree, also, that there are cases, in which the defendant cannot avail himself of the plea of self-defence, without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. A homicide committed under these circumstances is excusable, notwithstanding there may

have been some fault in the defendant. In the case of justifiable self-defence, the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavors by violence or surprise, to commit a known felony upon either. It is justly considered that the right in such case, is founded in the law of nature, and is not, nor can be superseded by any law of society. There being at the time no protection from society, the individual is remitted for protection to the law of nature.

Another principle of law is worthy of your notice at this time. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force; and even his servant then attendant on him, or any other person present, may interfere to prevent mischief; and if death ensue, the party so interposing will be justified. In such case, it is said nature and social duty coöperate. There is a species of self-defence known to the law, which, though involving fault to a certain extent, is yet excusable. The killing in such case is voluntary, the party having the intention to kill, or to do some great bodily harm at the time the death happened at least, but to have done it for the preservation of his own life. It arises from a sudden casual affray commenced and carried on in the heat of blood; and supposes that the person when engaged in such sudden affray, quits the combat before the mortal wound is given, and retreats or flies as far as he can with safety; and then, urged by mere necessity, kills his adversary for the preservation of his own life. This last supposed case borders very nearly upon manslaughter; and in fact and experience, the boundaries are in some instances scarcely perceivable; but in consideration of law they have been fixed. In both cases, it is supposed that passion has kindled on each side, and that blows have passed between the parties; but in the case of manslaughter, it is either presumed that the combat on both sides has continued to the time the mortal stroke was given, or that the party giving the stroke was not at that time in immi-

Commonwealth v. Riley and another.

nent danger. He therefore, in the case of a mutual conflict, who would excuse himself upon the ground of self-defence, must show, that before a mortal stroke was given, he had declined any farther combat, and retreated as far as he could with safety; and also, that he killed his adversary through mere necessity, and to avoid his own immediate death. If he fails in either of these circumstances, he will incur the penalty of manslaughter.

These principles are drawn from writers of the highest authority, and it belongs to you to apply them so far as they are applicable to the present case. Was it a mutual combat, or were the violent passion and the fight altogether on the side of McNally? Did he pursue Riley with a vengeful spirit? Did he use such force and violence, as made Riley believe, that his life was in danger, or that he was likely to sustain great bodily harm? In this connection you have a right to consider the relative size and strength of the parties and their dispositions and character, as they have been proved on this trial. If you believe, that when McNally had knocked Riley down, he stamped upon him with his foot, or kicked him in a vital part, of which there is some evidence in the testimony of James Devenny, who saw the whole transaction, and in marks seen three days afterwards by Dr. Flint, on Riley's person; I will not undertake to limit his right to defend himself to his own feeble hand; but I consider that he might well defend himself with the knife which he received from Stewart. Had McNally taken the life of Riley, it would have been manslaughter; for, although Riley struck him at the gate, he immediately ran off, and there was no necessity for McNally to pursue him, however much his passions may have been roused by the affront. If Stewart believed at the time, that McNally intended to kill Riley, he had a right to interfere to prevent further mischief, and to give to Riley a weapon which was necessary for his defence.

But of all these facts and circumstances, you must judge. You represent the people, and the justice of the country, and

Commonwealth v. Low.

you are bound by a solemn oath to pronounce a true verdict. There has been in this case as much testimony in favor of the mild and peaceable disposition of both the defendants, and of their general character for meekness and forbearance under provocations, as is ever to be expected in a court of justice. Merchants and citizens of the best character have attended to testify in their favor, in this hour of their peril; but if the government has made out a case of wilful and felonious killing to your satisfaction, against either or both of these defendants, you must find them guilty accordingly, notwithstanding their former good characters. But, if after a deliberate review of all the circumstances of the case, it remains a doubt in your minds, whether they are guilty or innocent, the law permits you to throw the evidence of their good character into the favorable scale, and it is to weigh on the side of mercy. Still, however, if you believe that Riley used the knife when his life was not in danger, and when he had no reasonable ground to fear any great bodily harm, you must find him guilty; and, under the circumstances, Stewart must share the same fate, unless you should believe that Riley used the knife in a different manner, and for a different purpose from that for which it was put into his hands by Stewart.

The jury, after deliberating for about twenty minutes, returned a verdict of not guilty for both defendants.

MAY TERM, 1837.

COMMONWEALTH v. NATHANIEL LOW.

If one, having no cause of action, sues out a writ for a fictitious demand, and so gets possession of the property of another, which he converts to his own use, and with intent to defraud the owner, it is larceny.

Commonwealth v. Low.

If one, having a right of action, makes use of a process, which he knows that he has no right to adopt, to get the property of his debtor, and with intent to defraud him, it is larceny.

THE facts in the case, and the points of counsel, will appear in the following charge to the jury.

Parker, for the commonwealth.

Choate and *Bartlett*, for the defendant.

THACHER, J. The charge against the party on trial, Nathaniel Low, sets forth, that he, with one Thomas H. Delano, on the first day of April last, did feloniously steal, take, and carry away seventeen notes of hand, for various sums of money, which amounted to six thousand one hundred and eighty dollars, the property of Charles Haynes, from his possession. One of these notes, for one thousand eight hundred and ten dollars, was given to Haynes by Low for his own debt, and the rest, amounting to four thousand three hundred and seventy dollars and twenty cents, were held by Haynes as collateral security for its payment. It is usual, where two or more are jointly indicted, to put them on trial together. But the counsel for Delano moved for a separate trial; and as the attorney for the commonwealth informed the court, that he should not proceed against D. if L. should be acquitted, the court granted the motion. You are now to pass on the case of Low only. That the notes in this case were taken and carried away by Low, is not denied. Were they taken feloniously, and what constitutes the guilt of larceny — have made the principal subjects of controversy, and have much occupied the learning of the eminent counsel in their arguments. It is necessary, that you should have clear and distinct ideas of the law on this subject, that you may apply it to the facts in the case. If I succeed in giving you right instructions on the law, the responsibility of a correct final decision will rest on you. The offence of larceny consists in the felonious taking and carrying away of the property of another, without his consent, and against his will, and

with the intent to convert it to the use of the taker. A felonious taking supposes not only a trespass, but a fraudulent and wicked mind in the trespasser, acting against his own conviction of right, and the plain dictates of common honesty. Therefore, I infer, that the law does not know such a thing as a technical larceny, separate from the conscious intention at the time to commit the offence. There must be in the party accused, an original felonious intent to take the property of another, without his consent and against his will, and with intent to convert it to the use of the taker. Where the action is free from this odious ingredient, it is not a felony.

In the case on trial, the property was taken from Haynes by means of a trustee process, instituted by Low against Haynes, in which Delano was summoned as his trustee. If you should be satisfied that the property was taken, and that the intent was felonious, the mere form of proceeding will not alter the nature of the thing. In all criminal cases, the crime, except where the law itself implies malice in the act, consists rather in the intention than the action. If a person makes use of the process of law to do an unlawful act, it will not make the act lawful; on the contrary, it is rather to be regarded as an abuse of the law, and increases the malignity of the act. And however difficult it may be to establish proof of a felonious intent, where a party gets possession of another's goods by act of law; yet if the fact be clearly made out, it is one of the highest aggravations of the offence of larceny. It is converting the process of the law, which is the best security for property, into an instrument of rapine and plunder. (2 East, 66.) If one, having no cause of action sues out a writ, for a fictitious demand, and so gets possession of the property of another, which he converts to his own use, and with intent to defraud the owner, it is larceny. Even if a man, having a right of action, makes use of a process which he knows that he has no right to adopt, to get the property of his debtor, and with intent to defraud him, it is larceny. The offence, in such case, consists in doing

Commonwealth v. Low.

what he knew was wrong, and which he had no right to do. I am not prepared to say, that in such case he is not answerable for the act, whether he knew the extent of the criminality or not; because every man is considered as answerable for the legal consequences of his own acts. I repeat, therefore, that if a man designs to take the goods of another feloniously, let him put it into what shape he will, if that is only the pretence and color, it is felony; nay, if by color of the law, he possesses himself of goods with a felonious intent, in that case, it is so far from being an excuse, that it is, as I have said, an aggravation of the offence. The question of intention is for the jury in all cases, and it is to be inferred from all the circumstances of the case, where the party does not voluntarily confess his guilt.¹

As this appears to me to be the law, from all the cases, I shall briefly notice the general outline of this case, leaving it to be settled by you from a careful consideration of all the evidence:

In a series of dealings between Haynes and Low, the latter became indebted to Haynes, in the sum of one thousand eight hundred and ten dollars, for which he gave his note to Haynes, on the 31st day of March last. He is a broker, and obtained for Low, at his request, various sums of money, at different times, for which Haynes charged and was paid a high premium. Whether these sums of money were advanced by Haynes himself, or whether they were obtained by him from others, in the

¹ To the points of taking and intent, see 2 Russell on Crimes, 93, 1033; 2 Leach, 1089; 2 East P. C. 553, 554, 555, 675, 693; Roscoe's Crim. Ev. 466, 471, 490; 1 Hale P. C. 507; 2 East P. C. 660; 3 Inst. 108; 1 Leach, 1; *Morfit's case*, 1 Russ. & Ry. 307; *Cabbage's case*, ib. 292. To the point of obtaining possession by fraud and artifice, see *Leckle's case*, 2 East P. C. 556, 675, 683, 685, 689; 2 Leach, 340; *Chisser's case*, 2 East P. C. 877; Sir T. Ray's R. 275; Gow's N. P. Cases, 224 and note; 1 Moody, C. C. 14, 185; Roscoe's Crim. Ev. 469, 490; 1 Leach, 236; 2 East, P. C. 536. As to abuse of legal process, &c. &c. see Roscoe's Crim. Ev. 471; 1 Hale, P. C. 507; 2 East, P. C. 660; 2 Russ. 130; 7 Mass. 438; 9 ib. 537. See also, Roscoe, 512, 513; 7 Taunt. 59; Ry. & M. N. P. C. 178; 7 Bing. 543; 13 East, 509; 2 Leach, 1036, 1090; Russ. & Ry. 232; 2 East, 682, 683; 2 Russ. 1054;

course of his business, has not been a subject of inquiry. It does not appear that any dispute ever arose between them on the subject of Haynes's charge for interest and brokerage. It does not appear that Haynes abused his confidence ; or that any controversy existed between them, till Low purchased his writ on the 31st day of March. But it would seem that in time, Haynes became desirous to receive his money, and that he intimated to Low that he must pay it ; otherwise, he should dispose of the notes which he held as collateral security. On the 31st day of March, a settlement took place, and Low gave to Haynes on that day the note for one thousand eight hundred and ten dollars. Haynes states, that on the first day of April, he received a letter from Low written in friendly terms, telling him that he had at last got the money, and that he would oblige him by coming to him on receipt of it, as he had an ague, and was otherwise quite unwell. He accordingly went to Hamilton Davidson's store, where Low did his business, and found Low and Delano there, in the counting-room, no one else being present. He asked Low if he had the money for him. Low said he had. He said he had all the collaterals but one, a note of Nathan Lyndes, which he could get in the course of an hour. But Low said he had a bad tooth-ache, and wanted to go home, and asked if he had any other note in his pocket, which he could leave in place of Lyndes's. Haynes took out the note of Isaac D. Farnsworth for six hundred and ninety-two dollars, which he offered to leave in room of Lyndes's, which was satisfactory, and it was to be exchanged in a day or two. Delano held in one hand a paper, which contained a list of the collateral notes. Haynes took the notes from his pocket, and Low requested Delano to check them. Haynes called them over, one by one, and Delano checked them. He had one signed by Drew & Babcock, for two hundred and forty-seven dollars, which was not on Delano's list, which he laid down by itself, and the others by themselves. He put the note for one thousand eight hundred and ten dollars with the collaterals. After

Commonwealth v. Low.

Delano had checked them, Low standing by, Delano said to him, "the notes are right, pay him the money." Delano then snatched up all the notes except Drew & Babcock's. Low took Drew & Babcock's note, and ran out of the counting-room across the street. Delano, he says, ran into the back room of the store, but no money nor check was produced or offered. After Low had said "pay the money," and before they ran out, Haynes says, he turned and saw Delano and Freeman, the deputy-sheriff, in the other room, the latter reading a paper to Delano. He drew towards the door, and heard Delano say to Freeman, "what does all this mean? I have nothing which belongs to Haynes except these notes," which he held in his hands at the time. All was the work of a very few moments. They then came into the counting-room, and Haynes says, he was informed that Delano was trusted by Low on his account. He asked Delano to return the notes after Freeman had left; but Delano refused, until he should have consulted a lawyer.

From the testimony of Watson Freeman, the deputy-sheriff, it appears that he was employed that morning by Low to go to the store, and was stationed in the chamber to wait till Haynes should come, and upon an agreed signal, he was to come and serve the process on Delano. He waited till he received the appointed signal, and then came down and made the service. He said that he had often waited before, but had never used any finesse before that time to make a service. McGookan, who was called as a witness by the defendant, says, that he was placed outside the counting-room door, and on receiving a signal from Low, he gave the agreed signal to Freeman, who immediately appeared. You will judge, whether there is any discrepancy, in any material respect, or any important contradiction, in the statements of these three witnesses. If you find anything, you will decide which is most worthy of credit. In several, if not in most of the principal facts, they all agree. But McGookan says, that the papers were handed to Delano, one by one, which he took in one hand, while he marked them

off with the other, and that when Freeman called to him, he came forward on a walk. He says too, that he did not see Delano snatch up the papers, but that he was called to customers very soon. From that time, Haynes has not seen these papers, and the defendant says on his oath, he has not got them. On application to Delano on the same day, three or four times, and once with Mr. Sargent, who claimed to own one of the notes, Delano refused to deliver them to him, unless he would give him a bond of indemnity, and he has never seen them since that time. It appears, that on the day preceding, Low procured this trustee writ, the date of which was altered that morning, and for this occasion.

The attorney for the government contends, that this was a felonious taking by Low and Delano, and that the service of the writ was an abuse of legal process, to cover the fraudulent intent to get these notes from Haynes, against his will and consent, and to convert them to Low's own use.

But, on the part of the defendant, it is said, that he had a legal and valid ground of action against Haynes, for usurious interest paid to him, and that this action was brought for three-fold the amount, which is the legal penalty; that this was the only way that he could get security; and that what he did was in pursuance of the advice of learned counsel. You must judge of the evidence on these several points. I confess to you that I fully expected that the defendant would have called his learned advisers to testify as to what passed between them, at the time he purchased the writ. If he waived his own privilege, the counsel could have stated the particulars of that consultation for his benefit, if it would have availed, and one reason why the court declined to give an opinion on the case yesterday morning, was to give an opportunity to the defendant to give such explanation, as would have tended to show that he was advised of his right to sue Haynes in this way, and that he had a reasonable belief and expectation that he was right in so doing. Such evidence would have tended to show that

Commonwealth v. Low.

he did not design to defraud Haynes of his notes, and consequently to negative the felonious intent. For Haynes expected, when he went to the store, that Low would pay his note. He expected to receive his money, and was ready thereupon to deliver over the notes. They were to be reciprocal and concurrent acts, and to be done at one and the same time. But the money was not paid, nor the notes delivered, and in contemplation of law they still remained in the possession of Haynes, and were his property. Haynes had not delivered these notes to Delano, nor consented to take him as his debtor, in place of Low. That required his consent. In taking the notes before he had paid the money, and without the consent and delivery of Haynes; both Delano and Low, under the most favorable consideration, were guilty of an act of trespass, for which an action would lie: and it would depend on the pleasure of Haynes, whether he would afterwards waive the tort and sue Delano in *assumpsit* for the value of the property. But I consider that Delano ought not to have detained these notes for a moment. The process was not a justification to him. Because Haynes had not entrusted him with these notes, nor did Delano owe him for the amount. They might have been the property of other persons. Low must have known that Delano was not indebted to Haynes, and consequently that he was not his trustee. If you believe therefore that this was a fraudulent plan in the defendant to get these notes into his own possession or control, from the possession of Haynes, against his will and without his consent, and that Haynes did not intend to part with his notes to the defendant without having the money paid first, that he did not act at the time under a reasonable ground or expectation of right on his part, and that he was aware at the time that he committed a wrongful act, you will have the right to infer, that the defendant had a preconcerted design to get the notes into his possession, with an intent to steal them.

But you are the judges of the defendant's intent, and you must

Commonwealth v. Drake and another.

act on your weighty responsibility. If the defendant has satisfied you, or you believe from all the evidence in the case, that Low acted with good faith on his part, that he reasonably believed that he had a good cause of action against Haynes, and that he might lawfully use this trustee process in this manner, to obtain security for his demand, that will negative the felonious intent, and will authorize you to give a verdict of acquittal. You must weigh the whole evidence in the case, and if, on a candid survey, you are not satisfied, from the evidence in the case, that Low acted with a fraudulent design to wrong Haynes out of his property, you must find him not guilty. And if a reasonable doubt of his guilt rests on your minds on a survey of all the evidence, then you must let that doubt operate in his favor, and find him not guilty.

The jury found the defendant not guilty.

JULY TERM, 1837.

COMMONWEALTH v. SIMEON DRAKE AND AARON B. DRAKE.

Where, in the trial of an indictment for cheating an insurance company by false pretences, the president of the company testified to certain instructions given by him to one of the defendants, relative to the character of the evidence of the loss required ; it was *held*, that the declarations of such defendant, made to a third person, in the absence of the president, after the giving of such instructions, were not admissible to explain or contradict the testimony of the president in regard to them.

THE defendants were tried on an indictment for knowingly and designedly cheating the Manufacturers Insurance Company, of one thousand dollars, by false pretences, by averring that certain bills of parcels, and among these, one purporting to be signed by one Charles Covill, were genuine and true bills and duplicates, to prove a loss by fire, on a policy which had by them before that been effected in the office of said company.

Commonwealth v. Drake and another.

Whereas the said bills were not genuine or true duplicates, but were forged.

The jury were unable to agree in a verdict, and the case was taken from them, after they had been together a night and a day.¹ In the course of the trial, the following point of evidence was ruled by the court, after argument. In support of the prosecution, *Charles W. Cartwright* was sworn as a witness, and testified, among other things, that Simeon Drake called on him, at the office of the Manufacturers Insurance Company, to give notice of his loss, informing him, at the time, that his books were saved, but that his bills had been consumed in the fire. The witness, who was president of the office, then required Simeon Drake to produce evidence of the loss, and told him that he must get duplicate bills of his purchases. Simeon Drake said that he did not know that he could get all the bills. The witness then told him where he could not get all his bills, to produce certificates, and he would treat them liberally. The defendants then offered *Nathaniel H. Cross*, as a witness, to prove certain declarations made by Simeon Drake, after this interview with Cartwright, and before he had done anything, or prepared a single document, to show what he understood by those directions from Cartwright, as to proof of the loss, in order to show that he did not expect that he was required to produce genuine duplicates with true signatures, but only that he was to exhibit a true estimate of his loss. This testimony was objected to by the county attorney.

Parker, for the commonwealth.

Choate and *George W. Phillips*, for the defendants.

THACHER, J. The best evidence of what the party understood, that he was required by Cartwright to do, to prove his loss, will consist in his actions. Declarations are equivocal in their nature, and may be true or feigned; but actions are defi-

¹ This case was continued from term to term, until January, 1839, when a *nolle prosequi* was entered by the county attorney.

nite, and capable of a certain construction. If the party intended to commit a fraud, it would be easy beforehand to make declarations to excuse it. But his actions and conduct are definite, and will be a satisfactory ground to assist the jury to come to a true verdict. If Simeon Drake, after the conversation with Cartwright, had obtained from individuals statements of his purchases, and had reported them truly to the office, as evidence of his loss, it would be for the jury to decide whether it was not all that was required or necessary for him to do, in compliance with the instructions of Cartwright. If, however, instead of this, he fabricated false papers, and presented them to the office as evidence of his loss, it will then be for the jury to decide whether that could possibly be within the meaning of Cartwright's instructions, and whether they believe that Simeon Drake could have so understood those instructions. And even if they should believe that Simeon Drake could not possibly have so understood those instructions, it will still remain for them to decide whether the bill of Charles Covill, and these other false documents, were uttered with intent to defraud the office. But to allow the declarations of Simeon Drake to a third person, in the absence of Cartwright, to be given in evidence to contradict the testimony of that witness, or to excuse the subsequent publication and uttering of a false document, is, in my opinion, against the rules of evidence, and inadmissible. Because it would be to allow the declarations of a party made at one time, to alter the nature and effect of his act done at another. If declarations accompany an act done, then they are admitted in evidence as part of the *res gestæ*, or transaction. And if, when Simeon and Aaron B. Drake presented the bills at the office, they had declared that they themselves had prepared them from memory, without consulting the persons from whom they purported to come, that declaration would have been admissible, according to the rule of law, and would have tended to remove the presumption of fraud.

For these reasons, the declarations of Simeon Drake to Mr. Cross are not admitted to be given in evidence.

DECEMBER TERM, 1837.

COMMONWEALTH v. JOHN ROBINSON AND SOPHIA ROBINSON.

The carrying away of a free black child, five years of age, against her will, from the family of the person by whom she had been formerly owned as a slave, and secreting her, is an offence within the Revised Statutes, c. 125, s. 20 and 21.

THERE were three counts in the indictment in this case. The first charged that the defendants, on the 17th day of September, A. D. 1837, at Cambridge, seized and confined and imprisoned a certain female child of tender years, to wit, of five years of age, and inveigled and kidnapped said child, with intent to cause her to be secretly confined and imprisoned in this state, against her will; and that the defendants, after seizing the child, took, confined, held, carried and brought her from Cambridge into Boston. The second count charged that the defendants seized the child with intent to hold her to service against her will. The third count charged that the defendants seized the child with the intent that she should be carried out of the state against her will.

The following testimony was introduced for the prosecution.

Henry Bright. — I reside in Cambridge. I have lived there since May last. About two years since I lived in Mobile. While there, I had a female slave, a very excellent woman, who died, leaving a female infant, whom my wife has since taken care of as her own. This child was removed to Cambridge with my family, and was a member of it in September last. On the 17th of that month, in the early part of the day, she was missing, and I have not since seen her. On missing the child, I made inquiries, and learnt she had been taken to Boston, in a carriage, by Mrs. Robinson. Soon after, I went to some leading abolitionists in Boston, as I supposed the persons

who had taken the child must have done so under a mistaken notion. I called on Samuel E. Sewall, Esq. with my wife. We stated to him the facts respecting the child; that her mother died with us, and that we had brought the child here to educate; that we had left Mobile with a view to reside here permanently; that the child was very much attached to Mrs. Bright, and she to the child; that we supposed she had been taken from us by the abolitionists, under the impression that she was a slave, and that we were ready to give them entire satisfaction that such was not the fact; that we were willing to give security to any amount that she should never be made a slave, and that we were only actuated by a desire for the good of the child. Mr. Sewall advised us to draw up a paper, setting forth the last-mentioned facts. At my request he drew up one; I signed it, and left it with him. The next morning I called on him again. He told me he had seen Mr. Snowden, the colored clergyman; that the latter could probably find the child, but, as the colored people were jealous of those who came from the South, he should like to have a bond from me that the child should never be carried into a slave-holding state. At my suggestion, he drew a bond, the penalty of which was five hundred dollars. I called the next morning. Did not see Mr. Sewall; but the young man in the office said the colored people would not give up the child. I then went to Mr. Ellis Gray Loring's office, knowing that he was an influential abolitionist. He said Mr. Sewall had spoken to him on the subject, and that he was satisfied that the child ought to be given up. He said some colored people had called on him; that he would send for them, and let me know the result. I called the next morning on Mr. Loring. After some private conversation between Mr. Loring, Mr. Sewall, and a Mr. Hanson, the latter expressed a desire that the child should be given up, and directed us to call on Mrs. Robinson. I requested a letter from Messrs. Sewall and Loring to her. They gave me one, the substance of which was, that they thought the child ought to be given up, as they did not suppose she

Commonwealth v. Robinson and another.

would ever be made a slave. I then called on Mrs. Robinson with my wife. Her husband was present a part of the time. I gave her the letter, and stated to her the particulars respecting the child ; our views respecting it, and that we held it as a free child. She said, without any hesitation, that she took the child from Cambridge ; that she had requested a Mr. Lewis, an aged colored man, at Cambridge, to bring the child to Boston, but he refused to do so ; but that he was at my house for a trunk, the morning the child left, and sent the child into the street ; that she then took the child and brought it to Boston ; that she did not take it on her own account, but at the request of two white ladies ; that she did not keep the child an hour, but delivered it up to the white ladies ; that she was perfectly willing to restore the child, if they were. We asked who the ladies were. She replied, she did not feel at liberty to tell, as they had requested her not to tell. We requested her to call on them, and get permission to deliver the child to us. She said she would go in the course of the day, and that probably those ladies would bring the child out to my house in the afternoon, in their carriage. If they did not, she would tell us the next day the result of her interview with them.

The next morning we called again on Mrs. Robinson. She said she had seen the ladies, and directed us to call on the two Misses Parker, in Hayward Place. We called on them. They expressed surprise that Mrs. Robinson had used their names, in the manner that led us to suppose they knew of the child before it was taken from Cambridge. They said they knew nothing of the little girl till the evening before, when Mrs. Robinson told them of her ; that Mrs. Robinson had called on them that morning, and requested permission to bring the child to their house ; that they gave her permission ; that they requested Mrs. Robinson to ask us to call on them, as they should like to talk with us. We stated to them the facts respecting the child. They said immediately, that the child should be re-

stored, and one of them went with me to Mrs. Robinson. We found Mr. Snowden at Mrs. Robinson's house. Mr. Robinson came in soon. Miss Parker advised them to give up the child. Mr. Robinson said he was perfectly willing to do what those benevolent ladies advised. Mr. Snowden remarked, after some conversation, that some of the colored people thought the bond was not sufficient; that he had nothing to do with it, but he thought that if the bond was made larger, it would be satisfactory. I answered that I would make the penalty of the bond as large as was deemed reasonable and proper, and that my only desire was the good of the child. Mrs. Robinson still hesitated about giving up the child. After some conversation, she said some other persons had taken an interest in the child, and she did not like to give it up without consulting them. She said that if we would call at Mr. Ellis Gray Loring's office in the afternoon, we should have a final answer, and that the child would probably be there. We called there and found Mr. and Mrs. Robinson, with several other colored persons there, with Mr. Loring. The child was not there. Mrs. Robinson said, that, notwithstanding the white people wished them to give up the child, the colored people thought differently, and were determined not to give her up, unless there was some law to compel them. Something was said in regard to treatment of the child while in our possession. We answered them she was treated with uncommon kindness, and if they would inquire of our neighbors or domestics, they would be satisfied of this fact. I also said, that I was a native of Massachusetts, and my wife of Connecticut, and that our sympathies with northern people were as strong as theirs. Till this time I had pursued the business with patience, supposing their motives were good. I now became excited.

I next applied to Charles G. Loring, Esq. for counsel. By his advice I took out letters of guardianship in Middlesex county. Before this, I think Mr. Loring sent for these parties. Afterwards I called on the defendants with an officer, and after reading to them the letters of guardianship, I demanded of

Commonwealth v. Robinson and another.

them the child. At first, Mr. Robinson said, he presumed we could have the satisfaction we wished. When his wife came in, she said she would not give up the child, but would stand a suit, or words to that effect. We had some conversation with a colored woman present, who said she believed the child was out of town. I then applied to Chief Justice Shaw for a writ of *habeas corpus*, but got no relief there. I then brought a civil action, as guardian for the child, against the defendants. Damages were laid at one thousand dollars, and property was attached. This did not have the effect to produce the child, as I supposed it would. I then complained to the grand jury.

Samuel E. Sewall. (Witness produced two papers signed by Mr. Bright.) I signed a note with Mr. Ellis Gray Loring, directed, I think, to Mrs. Robinson. In the note, we stated that we did not think Mr. Bright had any intention of carrying the child into slavery. There was a meeting afterwards, I think, at my office, at which there were several colored people. I think Mrs. Robinson was there. — *Cross-examined.* Have known Mr. Robinson for a year or two. I never heard anything against him, but my acquaintance with him is slight.

Ellis Gray Loring. Defendants, with Mr. Bright and wife, were at my office, with others, to consult about this affair. There was much discussion among them about slavery. The colored people expressed an entire distrust of Mr. and Mrs. Bright's sincerity, as they were slaveholders. There was much talk as to whether the child ought to be restored. The colored people expressed themselves generally, that they could not restore the child if they would. I cannot, however, bring this conversation home to the defendants particularly. Some of the colored people said the child was ill-used at Mr. Bright's; that there were the marks of a bruise on its head, and that her hair had not, from appearance, been combed for a long time.

Cross-examined. I have no doubt that I then urged the colored people to give up the child. They assigned two reasons for not doing it:— they were not sure that they could restore the child — and another suggestion was, that the slaveholders,

Commonwealth v. Robinson and another.

with their smooth tongues, could deceive Mr. Sewall and myself, but could not deceive the colored people. The colored people were very much excited, and so were Mr. and Mrs. Bright.

I was consulted by Robinson and wife, as counsel. — [The witness was here asked to relate the conversation, and objection to its being a privileged communication being waived, the conversation was related.]

Previously, another colored person had told me that there was a child at Cambridge, who was held by a slaveholder, and who would soon be carried into slavery. I was told that the child was permitted to go out of doors. I told the person that if the child was not restrained of her liberty, I doubted if any one could conscientiously take the oath on which to found a writ of *habeas corpus*. They asked what remedy there was. I told them that it was for the child to take its own liberty; that by a late decision in this state, this was the proper course. I was asked by these defendants, if they assisted the child to escape, whether they would be liable. I told them, they might lawfully receive the child, but had best return its clothing. I think these defendants were some of the people to whom I gave this advice. This was before the child left Mr. Bright. I was told that the child was seven or eight years old. If I had known its real age, (5 years) I should have hesitated at giving the advice I did give. I never supposed Mr. and Mrs. Robinson intended any injury to the child.

William Snowden. I saw Mr. Bright at Robinson's house. I told Mr. Bright, as he testified, that the colored people thought the bond for \$500, too low; that the child might be sold for that sum, and Mr. Bright would not be the loser if he forfeited the bond. Have known defendants several years. Their characters stand high.

The following paper was then read by the County Attorney. It was stated, that it was in the hand writing of Mr. Sewall.

Boston, Sept. 18, 1837.

To whom it may concern.

A colored child, named Elizabeth, aged about 5 years, having

Commonwealth v. Robinson and another.

been taken from me, on suspicion of being a slave, I think it proper to declare that I do not claim her as a slave—that when she was brought here, it was with the intention of having her free and so brought up—and though I intend to go to the South and spend this winter, I have no design of taking her back. Mrs. Bright is attached to the child and wishes to bring her up to be a useful woman.

I hereby promise never to claim the said Elizabeth as a slave, or to carry or send her to the slaveholding states as one.

It may be proper to add, that Mrs. Bright is an immediate abolitionist.

HENRY BRIGHT.

On the back of this instrument was indorsed the following.

Boston, Sept. 19, 1837.

I further agree and promise Samuel E. Sewall, to pay him the sum of \$500, on demand, in case the said Elizabeth is carried into any one of the slaveholding states by me or through my agency or permission, in consideration of his exerting himself to find and restore the said Elizabeth to my protection. The above sum, if forfeited, I agree that said Sewall may apply for the anti-slavery cause.

HENRY BRIGHT.

Boston, Sept. 19, 1837.

For the consideration aforesaid we guaranty the performance of the above contract.

N. F. CUNNINGHAM & Co.

Mary S. Parker. Mrs. Robinson applied to me to procure a place for a child whom she supposed to be a slave. I told her I would procure a place. I did procure one, and informed her of the fact. It was understood that she was to send the child to our house, at No. 5, Hayward Place. The child was not sent to us. I next saw Mrs. Robinson at her house. I went there in consequence of an interview with Mr. Bright. I assured Mrs. Robinson, that I felt a degree of confidence that the child would not be carried into slavery if returned to Mr. Bright.

Cross-examined. Have known Mrs. Robinson several years. Her character is good.

Eliza Parker confirmed the testimony of her sister.

Here the evidence for the government closed. A number of witnesses were called for the defence, who testified to the time and manner of taking the child from Cambridge. It was admitted, however, by the county attorney, that the character of the defendants stood high in the community; and it was admitted by the counsel for the defence, that Mrs. Robinson took the child out of the street in Cambridge, and, with her husband and children, brought her to Boston in a carriage, on the Sunday forenoon in question.

Mary Ann Whiting, sister of Mrs. Robinson, testified that the child remained at Robinson's till Monday morning, when, after Mr. and Mrs. Robinson had gone to their clothes store, in Brattle street, some five or six colored people came to Robinson's house, and rang the bell. She ran up from the kitchen, and the child followed her. Upon opening the door, one of the men asked her if there was a slave child in the house. She said there was. They then asked if the child by her side was the one, and she said it was. The colored people then put on its bonnet, and took her off. The witness tried to hold the child back, but all the others laid hold of the child, and pulled her away. The witness has not seen the child since, but has heard that she was in Salem, and attended a school there. The witness said that all the colored people were entire strangers to her.

Stephen Burt, formerly Mr. Bright's slave, but emancipated by him, testified that on the day of the death of the child's mother, she gave her to a colored fellow servant by the name of Eleanor.

The county attorney stated he was prepared to prove, by ten witnesses, the affectionate manner in which the child was treated in Mr. Bright's family, but the counsel for the defence stated that he did not mean to question that fact. In reply to a question of the court, the county attorney stated that Messrs. Sewall and Loring, Dr. Wainwright, Mr. Curtis and himself,

Commonwealth v. Robinson and another.

had urged the defendants to restore the child, but that they had uniformly declared that the child was removed from their control, and that they did not know where she was.

Parker, for the commonwealth:

B. R. Curtis, for the defendants.

THACHER, J. By the Revised Statutes of this commonwealth, c. 125, s. 20 and 21, it is declared that no person shall, without lawful authority, forcibly or secretly confine, or imprison any other person, within this state, against his will, or forcibly carry or send such person out of this state, or forcibly seize and confine, or inveigle or kidnap any other person, with intent either to cause such person to be secretly confined or imprisoned in this state, against his will, or to cause such person to be sent out of this state against his will, or to be sold as a slave, or in any way held to service against his will. Every such offence may be tried either in the county in which the same may have been committed, or in any county in or to which the person shall be carried; and upon the trial, the consent of the person so taken, shall not be a defence, unless it shall be made satisfactorily to appear to the jury, that such consent was not obtained by fraud, nor extorted by duress, or by threats.

Elizabeth Bright, the person alleged to have been seized and confined, was born a slave in the state of Alabama. Her mother belonged to Henry Bright, of Mobile, and since her death, the wife of Mr. Bright has taken the special care of the child, as her own, and she was living in the family of Mr. Bright, at Cambridge, on the day of the abduction complained of. Having been brought into this state by her master, she ceased to be a slave, and gained her freedom to all intents; it being established law, that the moment that the master carries his slave into a country where domestic slavery is not permitted, he becomes free. This child was as free, in respect of legal rights, as the child of any inhabitant of the state, and was entitled to the protection of the law. This right has been most

deliberately settled by the supreme judicial court of this commonwealth. They have solemnly decided that a citizen of any one of the United States, where negro slavery is established by law, who comes into this state for any temporary purpose of business or pleasure, staying some time, but not acquiring a domicile here, who brings a slave with him, as a personal attendant, cannot restrain such slave of his liberty during his continuance here, nor convey him out of this state on his return, against his consent. That tribunal have also decided, that if a child who was born a slave in, is about to be carried out of the state, and subjected to a state of servitude, they will grant a writ of *habeas corpus*, to bring such minor before them, and require surety in its favor, or even put it under the custody of a new guardian. They have gone to the utmost verge of law and right, to withhold such a person from slavery. I shall not enter into the grounds of the decision, nor attempt to scan it according to the rules of the constitution, but shall consider it as the law of the land, and binding on this court. Hence you see, that Elizabeth Bright, the child whom the defendants are charged to have abducted by force and against her will, was free at the time, and under the highest legal protection, and that she could not be unlawfully imprisoned within the state, nor carried out of it against her will, either by Mr. Bright, who once claimed her as his slave, or by the defendants at the bar.

It has been proved by the evidence in this case, and in fact, it is admitted and avowed in argument, that on the 17th day of September last, the defendants went to Cambridge, and there, without the knowledge or consent of Mr. Bright, and without any legal authority, took this child and brought her to their house in this city, on the same day ; and you are to judge, from the evidence, whether it does not appear, that they, together with certain other persons, whose names are not known, have secreted and kept this child confined from her natural friends, from that day to the present. The nurture and education of this child had, by a high natural and moral obligation, de-

Commonwealth v. Robinson and another.

volved on Mr. Henry Bright and his wife, and they had assumed and were exercising the responsible trust; nor does it appear that they had treated it other than with kindness, or that they were disposed to do so. If the child had been treated with inhumanity, any citizen might have complained in its behalf; and the voice of the law would have responded to the claim of humanity, and granted instant protection and redress. But it is in evidence, that the child was happy and contented with its natural protectors, on the day of its abduction. The measures taken by Mr. Bright to recover the child, prove that he acted with humanity, and that he felt a deep interest in its welfare. His statement is confirmed in every material fact, by the testimony of Samuel E. Sewall, and E. G. Loring, Esqs., Rev. Mr. Snowden, and the Misses Parker.

Mr. Loring states some additional facts, from which it would seem, that a plan was deliberately laid by the defendants and others to get this child into their possession; that they deceived even him as to the age of the child. The advice which Mr. Loring gave to them, is no apology nor justification in law for the abduction.

It appears, then, that they got the child into their possession, and that on the next day persons came to the house in their absence and took it away. Now it does not appear, that the defendants expressed surprise at this fact, or were dissatisfied with it, or that they took any pains to recover the child. And in no subsequent interview with Mr. Bright, did they pretend, or have they ever pretended, that they were ignorant where it was. Hence, if this abduction was the effect of a conspiracy, and the defendants were conspirators or accomplices in the act, they are accountable for the offence. If they took this child and carried it away and have kept it in secret, they are responsible for it in law. If they did the act deliberately, the legal presumption is, that they intended to confine it against its will. Having inveigled the child into their possession, they are bound to account for the act, and to show that it was for an honest and

lawful purpose. For the act of seizing a person and detaining him is, *prima facie*, unlawful, and the burden is on the party accused and proved to have taken and detained him, to satisfy the jury that he had right so to do, and that the person was not confined against his will.

To show that the defendants were free from an evil intent, and that they acted on the high principles of humanity and benevolence, witnesses have been called to prove that the defendants have borne a good character. Now, gentlemen, if the deed is satisfactorily proved to have been committed by these defendants, their former good character is not to avail for their acquittal, although it may speak much in mitigation of their punishment, especially if, by hastening to restore the child, they should acknowledge their fault. For it would be contrary to all the maxims of law, that because a man has once borne a good character, he should not be answerable for a deliberate offence. Besides, it should be recollected, that all evil examples, especially the worst, proceed from the good, and are, for that cause, so much the more dangerous.

You are to judge of the act done, and of the intent of the actors. It is admitted, that the defendants carried off the child on the 7th day September last, from its natural protectors — they have kept it in secret confinement to this day — and they have refused, in this court, to account for it to you, their legal and equitable judges, or to produce it and place it under the protection of the law. Is it alive or dead — is it in sickness or health — is it in the hands of the humane — or exposed to neglect, to want, and in the road to moral ruin and to an early grave? I am free to instruct you, that I consider that the defendants are bound in law to produce this child, and to place it under the protection of the law. Hitherto they have set their own will above the law. It is for you to say, on your responsibility, whether they are guilty or innocent of this offence.

It is your province to decide from the act done, and the manner in which it was done, with what intent this child was abducted by the defendants; whether to confine it secretly in this

Commonwealth v. Randall.

state, or to subject it to service, or to send it out of the state, against her will. You may be of opinion, that it was done innocently and without an unlawful intent; in which case, you will acquit the defendants. From the fact, that, from the time the child was taken, to the present moment, it has been kept in secret confinement, away from its natural friends and protectors, and without their knowledge, and that the defendants now refuse to put it under the protection of the law, you must judge of the act done, and of the intent of the actors at the time. You are constituted the judges both of the law and fact; and you must decide, whether the abduction of the child, and its subsequent secret detention, were, or not, a violation of the law on which the indictment was found.

The jury returned a verdict, that both defendants were guilty on the first and second counts, and not guilty on the other.

The defendants were sentenced to imprisonment for four months in the common jail, and to pay a fine of two hundred dollars and costs. The prisoners claimed an appeal, and gave bonds, in one thousand dollars each, to appear before the supreme judicial court.¹

JANUARY TERM, 1838.

COMMONWEALTH v. OTIS G. RANDALL.

Evidence that a witness used expressions, after a trial, contradicting his testimony in court, is not ground for a new trial.

Where, in the trial of a case, the fact of the assignment of a judgment to the

¹ This appeal was entered at the March term of the supreme court, 1838; but on the 22d day of October of that year, upon request of Henry Bright, the prosecutor, and upon payment of costs, — the child having been returned to Bright, and the expenses of the civil suit having been large, — the commonwealth's attorney entered a *nolle prosequi*.

Commonwealth v. Randall.

defendant became of consequence, and the attorney for the commonwealth denied the existence of the judgment, which denial the opposing counsel and the court did not understand him to make; and parol evidence to show that such judgment had become the property of the defendant, was rejected by the court; and where it appeared, on application for a new trial, that such judgment was indorsed and made payable to bearer, and that time would have been allowed by the court for the production of such judgment, if the attorney for the commonwealth had been understood to deny its existence; a new trial was granted.

Parker, for the commonwealth.

Choate and *E. D. Sohier*, for the defendant.

THACHER, J. At the December term, 1837, the defendant was indicted for, and convicted of stealing a note of hand for five hundred and forty-seven dollars and fourteen cents, the property of Clarke F. Hartwell, in the possession of Charles Haynes. The court left it to them to decide, 1, whether the note was the property of Hartwell; and 2, whether they believed, from the evidence, that the defendant stole it from the possession of Charles Haynes. If they believed that Hartwell had borrowed of Charles Haynes two hundred and fifty dollars, and given to him his check for that sum, and he held the note for five hundred and forty-seven dollars and fourteen cents, as collateral security for its payment; Hartwell owned the note, and was entitled, on payment of the check, to possession of the note. For the purposes of the trial, it might be considered in law as his property. It was left to the jury to determine, on the evidence, whether the check for two hundred and fifty dollars was the property of Charles Haynes. If they believed that fact, then it would follow that Haynes had an interest in the note which he held as collateral security, and that the defendant might retain from the proceeds of the note, to pay his just claim against Haynes to the amount of Haynes's interest, if so much was due from Haynes to Randall.

The taking of the note by the defendant, and retaining of the proceeds, were an avowed contrivance by him to get payment

of his debt. But Haynes denied that he owed the defendant anything; and although he did not deny that the defendant held his note for one hundred and sixty dollars, he, on his part, claimed to hold a memorandum check of Randall's in offset, for two hundred dollars. The real question at issue was, whether Charles Haynes had an interest in the note for five hundred and forty-seven dollars and fourteen cents, for which he could retain against Dr. Hartwell any portion of the proceeds; and as it appeared in evidence that this check for two hundred and fifty dollars belonged to a third person, the jury believed that nothing was due from Dr. Hartwell to Haynes. Still, however, it is possible, if they had believed that nothing was due from Haynes to Randall, they would not have stopped to investigate the existing claims between Dr. Hartwell and Haynes, but might have believed that Randall had no right to the note or its proceeds; and as he seized the note and retained the proceeds, and refused to account with either for the amount, the jury might have believed that he intended to steal it, and that it was a fraud on both.

After the verdict was rendered, the defendant moved for a new trial, for various reasons; viz.:

1. Because the oral testimony of S. D. Ward, Esq. was refused to show that the defendant had an equitable interest in a certain judgment, which one Joshua P. Cushman had recovered against Charles Haynes. 2. Because the judge misunderstood the testimony of S. D. Ward, and under that mistake erroneously instructed the jury. 3. Because, since the verdict was returned, the defendant had discovered new and material testimony of which he was not before aware. 4. Because that justice had not been done, and that the traverse jurors who tried the case were desirous that a new trial should be granted.

In considering these grounds for a new trial, I will briefly refer to those which the court feels bound to reject. On examining the affidavits which relate to the discovery of new evidence, I am satisfied that the facts stated are either merely cu-

mulative in their nature, or that they are not material ; or that they existed at the time of the trial, and might have been obtained if diligence had been used. In some of the affidavits, the affiants depose to certain declarations of Charles Haynes, made by him in conversation since the trial. But expressions used by a witness, after a trial, contradicting or denying what he said in court, are not ground for setting aside the verdict, and for granting a new trial, but are evidence to convict him of perjury. In almost every instance, it would be easy for a losing party to obtain affidavits of that description. I must also disregard the certificates of the jurors, which are exceedingly general in their terms, and more expressive of a wish for a new trial, than a valid ground for granting it. They were obtained too, through the importunity of the defendant's wife, and they seem to have flowed from the humanity of the jurors, rather than from their deliberate judgment. It shows the wisdom of the law, which makes it a misdemeanor to apply to a juror before or during a trial, to influence his mind in a cause, which is to be decided by him in a court of justice. One of the defendant's counsel, Mr. Sohier, makes affidavit that the judge must have misunderstood Mr. Ward's testimony ; and he asserts that in stating it to the jury, on committing the case to them, the judge must have given to them an erroneous impression of that branch of the evidence. It so happens, that the judge took down Mr. Ward's testimony literally, as it fell from his lips on the stand. The facts which he stated, and read over to Mr. Ward in court during this argument were material, and appeared to operate, in all their parts, against the defendant. That testimony was read to the jury from the minutes taken by the judge. It is said that one expression of Mr. Ward was omitted. That expression, if it was omitted, related merely to his opinion, resulting from the refusal of Haynes to declare the name of his principal, although he made him known the very next day. Now, where a fact is stated, it belongs to the jury, and not to the witness, to form an opinion of its bear-

Commonwealth v. Randall.

ing on the case. The opinion of the witness is of no value, even if it is pertinent testimony in any other respect, than as it is sustained by the fact. This case convinces me, that it becomes counsel to be cautious how they undertake to testify to facts happening on the trial. Their feelings are warmly enlisted for their client; and they are too apt to view his case with a partial eye.

It is possible, that if the jury had believed that a debt was justly due from Haynes to the defendant, they would have viewed the conduct of the defendant in a different light; and I am inclined to believe, on reflection, that a misapprehension must have existed at the trial, on a material fact, between the counsel for the prisoner and the attorney for the commonwealth. The prisoner's defence rested mainly on the fact, that Charles Haynes was indebted to him, and that what he did was to obtain payment of his debt, and under a claim of right. In addition to the note for one hundred and sixty dollars which the defendant held against Haynes, the defendant said, that a certain judgment, in the name of Joshua P. Cushman against Haynes, belonged to him, and was due from Haynes to him. He relied on the testimony of Mr. Ward to prove this fact. Now, Mr. E. Hersey Derby and Mr. Sohier both say, in their joint affidavit, that they did not understand that the existence of that judgment was denied by the attorney for the commonwealth, but that they did consider that the objection to Mr. Ward's testimony, related to the proof of the property of the defendant in the judgment. But the attorney for the commonwealth says, that his objection went to the judgment itself, as well as to the assignment of the right to the property; and in his argument, on Saturday, he said, that if the record had been produced, he should not have contested the right of the defendant to prove, by parol testimony, that the property was in himself. The judgment was not produced at the trial, as it ought to have been, whether its existence was admitted or denied. It now appears by a copy of the original note, produced at the hearing

of this motion, that it was indorsed and made payable to the bearer, although the action was brought in the name of Cushman, the promisee. As I recall the evidence at the trial, it was stated by the defendant's counsel, and Mr. Ward did say, that he held an execution in favor of Joshua P. Cushman against Haynes. He was then asked to whom that execution belonged. The attorney for the commonwealth objected to the question, and insisted that it was not competent for the witness to testify orally to the fact. The court sustained the objection, on the ground, that as a record is the highest evidence in law, it could not be contradicted by such testimony. The court did not understand, that the existence of the judgment was denied; and it would not have refused time for the production of the record, if that had been asked. It was then said, by the defendant's counsel, that the witness would testify to an acknowledgment by Haynes, that the judgment was actually Randall's property. As such evidence would have contradicted Haynes's testimony in a material fact, the court allowed the question to be put and answered. But Mr. Ward could not testify that he had ever heard Haynes admit the fact. In not producing the record at the trial, the evidence of the defendant was defective. But it was said, that Mr. Parker appeared for Haynes in the defence of that action; and, if so, it naturally accounts for the neglect of the counsel, and for the presumed admission, and also for the supposition, that the question related to the property of the defendant, and the assignment to him.

It is very clear, from the case of *Dunn v. Snell*, (15 Mass. R. 481,) that not only evidence in writing, but oral testimony, is admissible to prove the equitable assignment of a judgment to a person whose name does not appear on the record. And, therefore, the testimony of Mr. Ward to that fact, would have been legal evidence, and ought to have gone to the jury. Whether it would have been sufficient to satisfy the jury that Randall was the owner of the Cushman judgment, does not appear. Whether the defendant could have retained the pro-

Commonwealth v. Randall.

ceeds of the note for five hundred and forty-seven dollars and fourteen cents, against Charles Haynes, by force of that judgment, and as owning the same in equity, I will not decide. It is clear, that he could not pay himself out of Hartwell's property. Haynes was a broker, known as such to the defendant; and the latter was bound to use great discretion to ascertain the true owner of the note, before he put it into his pocket, and appropriated the proceeds to his own use. On all these points, and on any which shall arise at any future hearing of this case, I reserve the right to express a free opinion, according to my sense of right at the time. It is manifest that a misapprehension existed between the learned counsel, on both sides, on a point which both deem material. It is equally apparent, that in rejecting Mr. Ward's testimony, as to the right of the defendant to an equitable property in the judgment, the court was not warranted by law. I am not disposed to say, that the fact was not material; but will reserve my privilege of judgment after a full hearing of the matter. I am not reluctant to declare, that I am always ready to correct my own errors. I am not conscious that I am so swayed by the pride of opinion, that I would suffer it to make me swerve from my duty, as a minister of the public justice. I have not the advantage of learned associates, to assist me in the necessary office of judicial self-examination; nor is it an easy or an inviting task, to look into one's own mind, to discover and correct its errors.

The verdict in this case was set aside, and a new trial ordered.¹

¹ A *nolle prosequi* was afterwards entered in this case, by the commonwealth's attorney, upon payment of the money by the defendant to Hartwell.

JANUARY TERM, 1838.

COMMONWEALTH v. BENJAMIN T. PRESCOTT.

Under the statute of 1835, c. 139, regulating the size of wooden buildings to be erected in the city of Boston, it is not lawful to erect a building ten feet on the ground in length, by five in width, and forty-two feet in height, three sides of which are of wood, against the wall of a brick dwelling-house, to be used as a staircase; although such building be covered with zinc.

THE defendant was indicted for erecting a wooden building in the city of Boston, contrary to the statute of 1835, c. 139. The facts in the case will appear in the charge to the jury.

Parker, for the commonwealth.

Sprague, for the defendant.

THACHER, J. As this is the first prosecution under the act of 1835, "for the further regulation of the erection of wooden buildings in the city of Boston," I have thought it my duty to give to it deliberate attention. By the act of February 23d, 1818, to secure the town of Boston from damage by fire, "no building more than ten feet high from the ground to the highest point of the roof, may be erected within that town, unless all the external sides and ends thereof be of brick or stone, and the roof entirely covered with slate, or some incombustible composition, and the walls be twelve inches thick in the lower story, and eight inches thick above the lower story. By the fourth section of that act, additions to any building, contrary to the true meaning of it, are likewise prohibited. The object of all the laws relative to the security of buildings in this city, is to guard the inhabitants from damage by fire. Various modifications of the law of 1818, relaxing its provisions, and permitting the erection of wooden buildings, were made by successive acts,

between the enactment of that general law, which is still in force, and the act of 1835, c. 139, on which the present indictment is founded. By this last act, the citizens are permitted to erect wooden buildings, the dimensions of which on the ground shall not exceed twenty-five by fifty feet ; or being in any other proportion, shall not cover more than twelve hundred and fifty superficial feet of land ; the walls not to exceed twenty feet in height, from the underside of the sills, which may be three feet and six inches above the level of the street, to the eaves of the roof ; the roof in the highest point thereof, is not to rise more than thirty-two feet from the underside of the sills ; and there is to be one scuttle, at least, at or near the highest point of the roof.

This indictment charges the defendant with a violation of this law, in having erected a certain wooden building within this city, ten feet on the ground in length by five feet in width, its walls being forty feet, and the roof forty-two feet in height, from the under side of the sills. Sundry witnesses have testified, and, in fact, it is not denied by the defendant, that he did erect for the purpose of a stair-case, a building of the foregoing dimensions, three sides of which were of wood, against the wall of a large brick and stone dwelling-house, which he had lately built on Howard street. At the time that the indictment was found, which was on the first Monday of November last, this addition to the house was not completed, but it was, at that time, raised to its present height, and the roof was covered with boards. It is possible that a citizen may, in erecting a building, quite unintentionally violate the provisions of law ; and, therefore, I have considered, that while a building is in the process of erection, the owner should be permitted to correct his errors ; and if, when completed, it shall be found conformable to law, it would be unreasonable to subject him to a penalty for an unintentional mistake. It seems, however, that in this case, it was the original intention of the defendant to cover this addition to the dwelling-house with a coat of zinc, which is a metal-

lic substance, of about the thickness of one-sixteenth of an inch ; and it has been shown, that since the indictment was found, namely, on the fifth day of December last, the building was covered with this metallic coat ; and he rests his defence, by his learned counsel, on the ground, that a wooden building so constructed and covered, is not a wooden building, within the meaning and intent of the law. But the county attorney contends, that it is within the law, and a violation both of its letter and spirit. In this conflict between the parties, it is the duty of the court to express to you with candor, its opinion on this matter of law.

The object of all laws on this subject is, as I have already said, to provide a protection from damage by fire. The walls of all buildings, exceeding certain dimensions, must be constructed of brick or stone, guarding thereby, both internally and externally, from that dangerous element. The building in question greatly exceeds in height the dimensions which are permitted to be erected of wood. The fact that it is only an addition to a large and costly brick and stone dwelling-house, cannot take it out of the statute. For if it were permitted under the law to erect this addition of wood, it would follow that the whole building might have been constructed in the same way ; and then it would follow that the whole city might be filled with wooden buildings of the largest dimensions, covered with zinc. Whereas the law says, that the external walls and sides of all buildings, exceeding certain dimensions, shall be built of brick and stone of a certain thickness. Although this building is covered externally with zinc, and is internally plastered with mortar, yet the substance is of wood, and it lacks all the security which the law contemplates and requires, to guard against destruction from the devouring element of fire. I am bound, therefore, to instruct you, that in point of law, the defendant has failed in his defence ; and it being a conceded fact, that the building was erected by him of wood, to its present dimensions, before the indictment was found, although, since that time, it

Commonwealth v. Canfield.

has been covered with zinc, you will be justified on your oaths in finding him guilty.

The jury did not agree.¹

MARCH TERM, 1838.

COMMONWEALTH v. NELSON H. CANFIELD.

Where, in the trial of an indictment for the forgery of a receipt and discharge for rent, by the altering of 10 dollars to 100, and by adding after the word "rent" the words "for one year from date," the jury returned that the defendant was guilty of fraudulently obtaining a receipt for one hundred dollars, for which he paid only ten dollars, and that the words "from date" had been added to the same; it was *held*, that such verdict did not justify a sentence, and that a new trial should be granted.

Held also, that although such verdict was amended, by consent of parties, by adding that the jury submitted to the court, whether the facts returned constituted a crime in law, — their verdict to be rendered according to such decision, — such consent did not justify a sentence.

Parker, for the commonwealth.

Sprague, for the defendant.

THACHER, J. Nelson H. Canfield was tried at the last term for forgery, which is, by the law of this commonwealth, a misdemeanor. The indictment contained two counts. The first was for forging an acquittance and discharge for money, which was of the following tenor: — "Boston, August 1, 1837. Received of Mr. Canfield 100 dollars in full for rent for one year from date. L. Goodridge," — with intent to defraud one Lowell Goodridge. The second count described the offence more specially. After reciting that Nelson H. Canfield, on the 1st day of August, 1837, paid to Lowell Goodridge the sum of ten dollars, for rent due to him, and that said Goodridge subscribed and delivered to said Canfield a genuine acquittance and discharge

¹ This case was continued, from term to term, until May term, 1838, when, upon motion of the county attorney, the court ordered that the indictment should lay on file.

for that sum, which was of the following tenor: "Boston, August 1, 1837. Received of Mr. Canfield 10 dollars in full for rent. L. Goodridge:" the indictment proceeds to charge, that said Canfield fraudulently altered and forged the same by inserting an additional cipher on the right hand side of the figures 10, making it to appear 100, and also by adding and writing after the word "rent," the words "for one year from date;" and thereby fraudulently made the said genuine receipt for ten dollars to be altered and become a forged receipt for one hundred dollars, (as set forth in the first count,) with intent to defraud said Lowell Goodridge.

After a laborious trial, the jury returned a verdict in the following words: "The jury find the defendant guilty of fraudulently obtaining from L. Goodridge a receipt for one hundred dollars, for which he only paid ten dollars; and that since the said receipt was signed by L. Goodridge, the words "from date," have been added to the same." The attorney for the commonwealth moved for, and the counsel for the defendant, objected to the acceptance of this verdict; and, as the court cannot with propriety refuse a verdict, if it be pertinent to the matter in issue, it was ordered to be recorded without prejudice to the rights of either party. Afterwards, by consent of the parties, and before the argument, this special verdict was amended so as to read as follows: "The jury find the defendant guilty of fraudulently obtaining from Lowell Goodridge a receipt for one hundred dollars, for which he only paid ten dollars, and that, since the said receipt was signed by said L. Goodridge, the words "from date" have been added to the same. And the jury submit to the court whether these facts constitute a crime in law, and if they do, then the jury find the said Canfield guilty—otherwise the jury find that he is not guilty."

In a special verdict, the jury are not to find evidence, but facts, on which the court must decide. But nothing is to be intended against the accused party, which is not expressed or necessarily implied for the verdict. The facts of this special

verdict would not authorize the jury to find, nor the court to infer, that the defendant was guilty of either count of the indictment. For Canfield may have obtained the receipt fraudulently from Lowell Goodridge, and the words "from date" may have afterwards been added; and yet if these words were not added by Canfield with an intent to defraud Lowell Goodridge, or if they were not material, it would not be forgery, nor could the court proceed to pass sentence. The language of the special verdict is extremely loose and indefinite. It says, "that the defendant is guilty of fraudulently obtaining from L. Goodridge a receipt for one hundred dollars," without saying whose receipt it was, or to whom it was given, or that it was the same which is described in the indictment. It also says, "that since the said receipt was signed by L. Goodridge, the words, 'from date' have been added to the same," but not by whom this addition was made, or with what intent. To obtain such a receipt fraudulently from another, would be an indictable offence. But in this case, that offence is not charged, nor was Canfield on trial for it. If it had been charged, the indictment ought to have set forth the means by which the fraud was effected, whether by false tokens or by false pretences; that the defendant, being informed of the accusation, might have prepared himself for the trial. The subsequent alteration of the receipt, allowing that it is material, without finding also that it was inserted by the defendant, and with the intent to defraud Goodridge, would not authorize the inference, that he was guilty of the crime charged. Therefore, the defendant cannot be recorded guilty under this indictment, and no sentence can be pronounced against him by force of the special verdict.

Seeing that this verdict cannot operate to convict the defendant under the indictment, what is its legal effect? Although the jury have found, that the defendant was guilty of something which was not charged, and for which he was not on trial, I cannot consider that his consent will authorize a sentence for any offence which is not described in the indictment. The de-

Commonwealth v. Dunham.

defendant cannot be tried twice for the same offence ; and unless he confesses his guilt by the plea of guilty, or there is a verdict on the whole matter, the trial is incomplete, and there can be no sentence as on a conviction. But we cannot deny to the commonwealth, the party injured, one fair trial of the accused, nor one final verdict in every case. If the jury return facts irrelative and impertinent to the issue, or partial and incomplete, not covering the whole ground, or if the point in issue cannot be concluded from their finding ; the verdict must be set aside, and cannot be the ground of a judgment. From the best consideration which I have been able to bestow on this verdict, it appears to be both uncertain and insufficient : and as it cannot be amended, nor its defects supplied, it is the opinion of the court, that it must be set aside, and that a new trial be ordered.

Verdict set aside, and a new trial ordered.

MARCH TERM, 1838.

COMMONWEALTH v. JOSIAH DUNHAM, JR.

It is no sufficient bar to an indictment, that the defendant has been arraigned at a previous term for the same offence, and that the former indictment is still pending ; but the prosecuting officer must elect on which of the indictments he will proceed to trial.

THE defendant was indicted for perjury in swearing to a false return of the state of the Lafayette Bank, in September, 1836, as cashier. To this indictment the defendant filed a plea in abatement, setting forth that an indictment was found against him at the February term, 1838, for the same offence, and praying that the indictment might be quashed. The county attorney demurred to the plea and the plaintiff joined in the demurrer.

Parker, for the commonwealth, cited 1 Chitty C. L. 446, 447 ; 1 Cro. Car. 147 ; *Ld. Raymond*, 922 ; *Foster C. L.* 104,

Commonwealth v. Dunham.

5 and 6 ; Doug. 240 ; Hawk. P. C. B. 2. c. 34. s. 1 ; *Rex v. Wildey*, (1 Maule and Selw. 188) ; 2 C. & P. 635. 640.

Edward Craft, Jr., for the defendant cited *Commonwealth v. Churchill*, (5 Mass. 176) ; *Rex v. Webb*, (3 Burr. 1468.)

THACHER J. To this indictment, which charges the offence of wilful perjury, the defendant has pleaded in abatement, that he ought not to be held to answer, because that at the February term, the grand jurors returned into this court a bill of indictment against him, wherein the same matters and charges are stated and set forth against him as in the present ; that said indictment charges in manner and form the same crime and offence of perjury against him, as by the record of the said indictment remaining would appear ; averring himself to be the same person, and that it is now pending in this court, and is yet undetermined. The plea concludes with a verification, and prays that this indictment may be quashed. The attorney for the commonwealth, after oyer of the former indictment, which is set forth, demurs to the plea, assigning several special causes, and the defendant has joined in the demurrer. It remains for the court to decide on the sufficiency of the plea in law to quash this indictment. It does not appear from the plea, that the defendant has been arraigned, or that any proceedings have been had on the first indictment. But that is not material ; for although two bills have been formed, it may be, that the last is better adapted to the nature of the case than the first ; and, according to the usage in such cases, the attorney for the commonwealth must be at liberty to prosecute in such manner as may best answer the ends of the public justice. The court, however, must take care, that the defendant be not exposed to the inconvenience of undergoing two trials for one and the same fact.

In *Sir William Withipole's case*, (Cro. Car. 147,) he was arraigned upon an indictment of murder, and it was moved by

his counsel, that he ought not to be arraigned upon this indictment, because he had been *autrefois arraign* upon an inquisition of murder, found before the coroner, and had pleaded thereto, and so concluded his plea by pleading not guilty to the felony. But it was held by all the court of King's Bench, that this was no cause of plea ; for where he is not convicted nor acquitted, he may be arraigned upon a new indictment. But to avoid any doubt, lest he should be questioned on both, the court ruled, that the first indictment should be quashed as insufficient.

Now it appears in this case, that the former indictment is, in the opinion of the attorney for the commonwealth, defective and informal ; that the facts are set forth in a different manner ; and that it contains an averment which is not true, arising from a clerical mistake. It is not only reasonable in itself, but for the ease of the citizen, that the attorney for the commonwealth should be allowed to correct his errors as soon as possible. Otherwise, after all the trouble and expense of one trial, the party may be harassed by a second indictment for the same offence, by reason of the insufficiency or defect in the first. Where judgment has been arrested for any defect in the indictment, a new one may be preferred, and the former cannot be pleaded in bar, as where there has been a final judgment of conviction or acquittal. The judgment of the court is, that the plea in abatement is not sufficient ; and that the defendant must answer over. But the justice of the case requires that the attorney for the commonwealth should elect on which of these indictments he will proceed to trial, that the defendant may not be embarrassed with two indictments at the same time, for one and the same offence. Having made this election, the other indictment will be dismissed.

Commonwealth v. Dunham and others.

MARCH TERM, 1838.

COMMONWEALTH v. JOSIAH DUNHAM AND OTHERS, DIRECTORS OF
THE FRANKLIN BANK.

COMMONWEALTH v. ISAAC O. BARNES AND OTHERS, DIRECTORS
OF THE LAFAYETTE BANK.

Where there is cause to apprehend, that, owing to an excited state of the public mind, a jury may not be as free to render justice to the defence as to the prosecution ; there is good reason for a continuance of the case, until there has been opportunity for the excitement to subside.

THACHER, J. At the February term, the defendants were indicted for an official misdemeanor, in their office, as directors of the Franklin and Lafayette banks. Upon their arraignment, on the 19th day of February, 1838, the cases were, on their motion, and according to the usage of the court, continued to the present term. The attorney for the commonwealth has now moved, that a day be assigned for the trials ; but the defendants have prayed for a further continuance, and as reason for the delay, they have filed affidavits, in which they say, "that an excited and highly prejudiced state of feeling exists, at the present time, in this county, and in the community generally, on the subject of banks and bank officers, in consequence of which, they are apprehensive that any jury by whom they would be tried, at the present term, would be so biased and prepossessed, as to prevent their receiving a fair and impartial trial ; which excitement and prejudice they believe will have so far subsided by the next term, that they can then submit to a trial with a reasonable expectation of meeting with full and impartial justice." It is according to the wisdom of our law, in all cases, to give to persons accused a fair trial, and before impartial judges ; for which purpose, it is necessary that he should have a reasonable time to prepare for his defence, and to meet

his accusers. It would not be honorable to the public justice, to compel a party to go to trial under circumstances, in which he might have just ground to fear, that he should not have an impartial hearing. For next to doing justice, it is most desirable, that the manner in which it is administered should be satisfactory to those who are immediately concerned, and to the whole community. If there is cause to apprehend, that owing to an excited state of the public mind, the jurors sworn to try the issue, might not be as free to render justice to the defence of an accused person, as to the accusation against him; it would be good cause to grant delay, until there has been opportunity for the excitement to subside.

Owing to the suspension of specie payments by the banks, and to the failure of the Franklin and Lafayette banks, of which the defendants were directors, and of other banks in this city and vicinity, it is well known that the feelings of the community have been greatly excited. Without doubt, there have been great faults committed, as well as misfortunes suffered, and some time will elapse before the merits of the actors in these scenes will be fully disclosed. The defendants are indicted for an alleged act of misconduct, in their office, more than six months before the banks suspended the payment of specie, and more than a year before the failure of their banks. The inquiry, at the trial, will be confined to the particular act alleged in the indictment, and the attention of the jury will be restrained to that inquiry. There has not been, to my knowledge, a similar prosecution in this commonwealth. The indictment has grown out of laws of recent date; and it may be expected that new questions will arise, which will call for all the attention and intelligence of the court and jury. The whole community have an interest in these trials, not so much that the defendants may be punished, if they should be found guilty, as that the law may be vindicated, and that its requirements may be generally known and carefully observed in future.

Commonwealth v. Dunham and others.

According to my understanding of the law, such a case as the present is not open to an appeal.¹ If the defendants should be convicted in this court, and should be aggrieved at the trial by any opinion, direction, or judgment of the court, in any matter of law, they will have right to allege exceptions to the same, on which the record will be carried to the supreme judicial court, who may, if they see cause, order a new trial. But, unless this court should have erred in its judgment, the verdict will stand ; and, therefore, the proceedings here are important to the defendants. As the law is free from passion and prejudice, so ought to be its ministers. That course should be pursued by them, which will be most likely to be approved by posterity. But the public good requires that there should be no unnecessary delay in the trial of criminal cases ; and that impressions should be made on the public mind, while attention is awake, and ready to receive them. For the cause assigned by the defendants, on their affidavits, and for the other reasons which have been suggested, the court feels justified in granting the continuance of these indictments to the third Monday of the next April term. This delay will enable the defendants to prepare for their trial, and to meet the occasion with confidence, like good citizens, and without indulging unreasonable jealousy. The commonwealth will not suffer from this delay. And, if justice is finally done, the public will be better satisfied, if it should be done in a manner consistent with humanity, and the rights of the accused.

Case continued.

¹ See *Commonwealth v. Dunham*, (22 Pick. 11.)

APRIL TERM, 1838.

COMMONWEALTH v. JOSIAH DUNHAM, JR.

Where, under the Rev. St. c. 36, s. 65, regulating the returns to be made by the officers of banks, a cashier swears that the return made by him, "is, according to his best knowledge and belief, true," knowing at the time that it is false, and taking the oath deliberately, he is guilty of perjury, under Rev. St. c. 128, s. 2.

Under the Rev. St. c. 36, s. 65, the return of the cashier must be founded on the books of the bank, and must contain a true statement of the condition of the bank, at the time of the making of the return; but if the return is substantially true, and gives a fair exhibit of the condition of the bank at the time, though it may not be indicated by the books, the cashier, in swearing to such return, is not guilty of perjury.

Where an indictment for perjury, in swearing to a false return of the condition of a bank, charged, generally, that the return was false; it was *held*, that the county attorney was not bound to specify in what particulars he expected to prove the return to be false.

THE defendant was indicted for perjury, under the Revised Statutes, c. 128, s. 2, in swearing to a false return of the condition of the Lafayette Bank, in September, 1836, as cashier. The return prescribed by the Revised Statutes, c. 36, s. 65, is as follows: "The cashier of each bank shall, in every year, make a return of the state of such bank, as it existed at two o'clock, in the afternoon of the first Saturday in such preceding month, as the governor may direct; and he shall transmit the same, as soon as may be, not exceeding fifteen days thereafter, to the secretary of the commonwealth; which return shall specify the amount due from the bank, designating, in distinct columns, the several particulars included therein, and shall specify the resources of the bank, also designating, in distinct columns; the particulars therein; (and here the form of the return, in substance, is set forth,) which return shall be signed by

the cashier of such bank, who shall make oath before some justice of the peace, to the truth of said return, according to his best knowledge and belief; and a majority of the directors of each bank shall certify and make oath, that the books of the bank indicate the state of facts so returned by the cashier, and that they have full confidence in the truth of said return; and no further return shall be required from said banks."

Parker, for the commonwealth, in opening the case, described the offence of perjury, and gave a synopsis of the history of the legislation upon the subject in this commonwealth, and read that part of the statute on which the indictment was founded. He defined the word *wilfully*, used in the statute, to mean the opposite of accidentally, by mistake, compulsorily, unintentionally. He said that a wilful oath, like the acknowledgment of a deed, was a free and voluntary act. If, however, it should be contended, that though the return might be proved to be false, yet that the defendant might not have known that it was false, and that therefore, he was not guilty of perjury; he should maintain: 1. That if a man swears a thing to be true, when he does not know whether it is true or false, it is wilful false swearing. To this he cited 1 Hawkins P. C. c. 69, s. 6. 2. That *belief* is an absolute term, and an indictment for perjury may be supported upon it. To this he cited Hawkins, as above, and note and authorities there given; Wilson, 427; *Pedley's case*, (Crown Law, 269.) He then stated, that although the oath, in this case, had the qualifying words, "according to his best knowledge and belief," yet, if he had the means of knowing the return to be false, and had no reasons to believe it to be true, he had committed the offence of perjury. He concluded with a statement of the evidence which he expected to produce, and then introduced the following witnesses.

John P. Bigelow, the secretary of the commonwealth, testified that a return was made in due form, which he produced.

Hugh Montgomery, testified that he was a justice of the peace, and that the defendant appeared before him, and made oath to the return, as it appeared upon the face thereof.

Commonwealth v. Dunham.

Cross-examined. Has known the defendant several years, and has had dealings with him, to the amount of many thousands of dollars. Always found him perfectly fair and honorable. Before he was elected cashier, he had been an inspector in the custom house, and, immediately previous, he was the agent of a manufacturing establishment. Never heard of his being connected with a bank, before he was cashier of the Lafayette Bank.

The return was then read, as follows :

State of Lafayette Bank, on the first Saturday of September, 1836, 2 o'clock, P. M.

DUE FROM THE BANK.

Capital stock,	150,000 00
Bills in circulation,	109,875 00
Net profits on hand,	2,343 68
Balance due to other banks,	16,369 86
Cash deposited, including all sums whatever due from the bank, not bearing interest — its bills in circulation, profits, and balances due to other banks excepted,	45,843 12
Cash deposited, bearing interest,	34,500 00
Total amount due from the bank,	<hr/> \$358,931 66

RESOURCES OF THE BANK.

Gold and silver, and other coined metals, in its banking house,	7,123 18
Real estate,	885 86
Bills of other banks, incorporated in this state,	23,986 00
Bills of other banks incorporated elsewhere,	19,346 00
Balances due from other banks,	8,000 00

Commonwealth v. Dunham.

Amount of all debts due — including notes, bills
of exchange, and all stocks and funded
debts of every description — excepting
the balances due from other banks, 299,590 62
Total amount of the resources of the bank, 358,931 66
Rate and amount of the last dividend,
Amount of reserved profits, at the time of de-
claring the last dividend,
Amount of debts due to the bank, secured by a
pledge of its stock, 1,000 00
Amount of debts due, and not paid, and consid-
ered doubtful.

JOSIAH DUNHAM, JR., *Cashier.*

Boston, October 15th, 1836.

Suffolk, ss.

Then the above-named Josiah Dunham, Jr., made oath
that the above statement is, according to his best knowledge
and belief, true. Before me,

HUGH MONTGOMERY, *Justice of the Peace.*

Charles Hickling. I am now cashier of the Lafayette Bank.
I have with me all the books of the bank, from the time it first
went into operation. I hold in my hand the cash journal. It
begins July 13, 1836, and ends November 16, 1836. The
book, without certain leaves, which I hold in my hand, is im-
perfect; with them it is perfect. I first saw this book, during
the investigation by a committee of the legislature. These
leaves were not in the book at that time. I first saw these
leaves on the 8th of April. I received them from William B.
Dorr, Esq. He was not an officer of the bank. I was told by
the defendant that Mr. Dorr wished to see me. I called on
him, and he wished me to make out a return of the state of the
bank. I told him the books were imperfect and I could not.
He then gave me these leaves, and I then made out a return,

after placing the leaves in their places. The leaves are all here, in regular order. I don't know why the leaves were cut out of the books. I was present before the legislative committee, when the defendant testified as to the cause of the leaves being cut out.

The return, made to the secretary of the commonwealth, was then put into the witness' hands, and he was asked to point out in what respects, if any, the return was false. The counsel for the defendant here insisted, that the attorney for the government ought to specify, in what particulars he expected to prove the return to be false. But the county attorney stated that it would be impossible for him to state every particular in which the return was false; and that as the indictment charged, generally, that the return was false, it was sufficient to prove it false in any particular. The court decided that the county attorney might prove the return to be false in any particular, and in the way he preferred.

The witness was then examined at great length, as to the actual state of the bank, as it appeared from the books, and the discrepancies between that and the return made by the defendant. He testified that there were two distinct sets of books, and the amounts in them were very different, on the same dates. The entries on the new books appeared, generally, to be the same as appeared on the return. The witness pointed out the discrepancies between the books, particularly. A part of them were as follows: On the day the return was made, there were —

Bills in Circulation.

On the old ledger, under the head "bank notes,"	
there was carried out,	168,500 00
On the new ledger, under the same head and date,	
was carried out,	109,878 00

This amount appears on the return, under the head of "bills in circulation."

Commonwealth v. Dunham.

Net Profits on hand.

Nothing appears on the old leger.

Balances due to other Banks.

On the old leger,	14,369 26
On the new leger,	1,164 86

Cash deposited, bearing interest.

On the old leger this does not appear.

On the new leger, under the head of "post notes," appears,	34,500 00
--	-----------

Amount of all debts, &c.

On the old leger, under "notes discounted," appears,	271,823 50
On the new leger, under the same head, appears,	262,859 27

The witness pointed out several other discrepancies between the old and new books, and many gross errors in the books. One of these was \$15,000, and another \$70,000. He underwent a long cross-examination, relating principally to details. On being asked whether he could, from the books, infer that the return was false, he said he could not. He said that the books were full of gross errors, and that it would be impossible to make a correct return from them; that the return differed from the books in many particulars, but that it could not be said, that, on this account, the return was false.

Joshua Child, successor to the defendant, as cashier. When I went into office, I took an inventory of the cash on hand, and entered it upon the blotter, because the books did not show the true state of the bank. I discovered, at the outset, that the notes discounted did not agree with the book. The witness then testified to discrepancies in the books, &c., in detail.

Adam R. Bowman. I was book-keeper in the bank, and set about making a return, but could not make it balance. I tried twice; then Hathorne, cashier of the Franklin Bank, tried, but could do no better. Hathorne then told the defendant that

the books would have to be forced, and the defendant made no answer. Hathorne made out a return, and I copied it, and the defendant signed and swore to it. There were so many errors in the old books, that I advised the defendant to have new books. These were made by the defendant and myself, after the return was made. I and the defendant often tried to make the cash balance, but never could; never knew the cash to balance.

Cross-examined. I was averse to going before the legislative committee, but the defendant advised me to do so. If I had not been so advised, I think I should not have gone. Before the return was made, we frequently attempted to take an inventory of the bank's debts and resources. I, at such times, took minutes, and also the defendant. I don't know who took these memoranda; Hathorne might perhaps have had them. At that time, Hathorne was a man of good character, and a first rate accountant.

Benjamin W. Thayer. I began service in the Lafayette Bank, July, 1836, and was there a year. I assisted the cashier, and wrote a very little. I understood from the defendant, that Hathorne was to make out the return, because the defendant was incompetent to make it out.

Cross-examined. I often tried with the defendant to make an inventory. We always did it on Sunday. We did this, because the state of the books was such, that we could not collect the situation of the bank from them. I never saw anything in the defendant that was not perfectly fair and honorable. The defendant was not at all acquainted with keeping bank-books. He never attempted to keep the books. His mode of doing business was hasty and loose. He did not tell what he did at the right time, and a book-keeper could hardly keep up with him.

Linus Child. I was chairman of the legislative committee, that examined the Lafayette Bank, last winter. The defendant testified before the committee. He was asked in reference to

Commonwealth v. Dunham.

the leaves that were missing from the books. He said he knew nothing about them. He said he knew nothing but that the return was correct. He said he did not make it himself, but supposed it to be correct.

Cross-examined. Mr. Bowman testified before the committee, that he began to copy the old books, before the return was made.

J. Vincent Browne. I was on the legislative committee, to investigate the affairs of the Lafayette Bank. There were discrepancies between the old books and the new ones. The witness then pointed out several differences between the old and the new books. The amount of one was more than \$18,000.

Hickling and Child were again called, more bank books produced, and more explanations given, by those cashiers.

Isaac C. Brewer, cashier of the Suffolk Bank, was examined as to the balance due from that bank, September 3, 1836, at 2 o'clock, P. M., to the Lafayette Bank. He stated the account as follows :

Permanent special deposit, . . .	\$ 8,000 00
Particular credit on bank books, . . .	4,838 07
	<hr/>
	12,838 07
Lafayette bills redeemed this day by Suffolk, . . .	12,200 00
	<hr/>
Balance due from Suffolk bank, . . .	638 07

Choate, (with whom were associated Sprague, Cruft, and Dorr,) in opening for the defence, contended that the government must establish two things. 1. That the return was false. 2. That Dunham knew it to be so ; or took no pains to ascertain whether it was so or not. He then insisted, that it had not been shown that the return was false. All that had been proved was, that the return was not like the old books. But the object of the return was, not to give a true account of the *books*, but of the *bank*. It was perfectly sure, that the old books did not give a true account of the bank, and if the return had

been like them, it would surely have been false. The whole evidence went to show, that the officers of the bank made particular exertions to ascertain its real condition, and in the absence of all positive proof that its real condition was not truly given in the return, the jury could not infer that fact simply because the return differed from the books. But if the return was false, there was no evidence that the defendant knew it to be so. The evidence was the other way. He was incompetent to take care of bank books, and he employed others to assist him in the matter. Those he employed then stood well, and he had every reason to believe they made out a correct return.

The following witnesses were then introduced for the defence.

William B. Dorr, Esq. In some conversation between myself and the defendant, on the 28th day of March last, it was suggested, that it was important that the missing leaves should be produced at the trial. He told me he had made great search for them but in vain, and wished me to ask Mr. Hickling to make search. I did so, and he told me he knew nothing about them. At my request, he showed me the loose papers of the Lafayette Bank, but I found nothing. I then asked for the key of the Lafayette bank, which is not occupied at present, and searched that bank. There are three closets; in one of these there was, on the floor, about half a ream of blank checks. Among them I found the missing leaves belonging to the cash journal. I carried the leaves to my office and locked them up. I afterwards told Mr. Dunham I had found them. He expressed much satisfaction, and requested me to show them to Mr. Hickling, and ask him to make out a statement of the condition of the bank from the old books.

Amasa G. Smith. Was a director of the Lafayette Bank when Mr. Dunham was chosen cashier. When the latter was elected, he declined giving an answer immediately. I asked him why he wished time to consider, and he replied that he was not competent to keep the books. I told him I thought the

Commonwealth v. Dunham.

directors would allow him a suitable compensation for clerk hire. He afterwards applied to me for a book-keeper, and I furnished one. I always understood that the defendant did not keep the books, and I have never seen anything in Mr. Dunham that was not honest and honorable. He ever had the confidence of the directors. He told me that he did not know how to make out the return. He asked the assistance of Mr. Hathorne, who explained the matter to him. Dunham then said he would make Bowman correct the books. Afterwards I heard Bowman say the books were full of errors, and Dunham then got Mr. Hathorne to make out the return.

Isaac O. Barnes. When Dunham was elected cashier he said he would not accept at that time. Afterwards he told the directors he would accept. It was fully understood by the directors that he could not keep the books himself. I never knew or suspected that Dunham was not strictly honest.

Cross-examined. It was understood when I was elected president, that I should have nothing to do with the business affairs of the bank. At the same time it was understood that Dunham, the cashier, could not keep the books.

By the county attorney. Then it amounts to this — you, as president of the bank, were to have nothing to do with its concerns, and it was well understood that the cashier was incompetent.

Witness. Mr. Dunham was not incompetent, excepting that he was ignorant of book-keeping.

George Page, Rev. H. L. Conolly, Prentiss Hobbs, David Henshaw and Barnum Field, testified to the good character of the defendant.

The counsel for the defendant said they should rest their case here. Mr. *Sprague* remarked, that he did not deem it necessary to address the jury, and was willing to submit the case without argument if the county attorney would do the same.

Parker, for the commonwealth, said he would have taken that course if one of the defendant's counsel had not argued

the case at much length in his opening address. Such being the case, he felt called upon to address a few remarks to the court, at least, and to call his honor's attention to what he deemed the more prominent features in the case. And in the first place in regard to the nature of the oath required. He insisted that it must be true, and that it must be such a statement as the books indicated. The directors' certificate and the oath show, that this was the intention of the legislature, and the defendant must so have understood it, for he and Bowman and Hathorne made four several attempts to make the return from the books.

Considered in this light, the return was manifestly false. Both the old and new books show it to be false, and Hickling and Bowman's testimony prove the same. Considered in every other light, the return was false. It exactly balances, and is made so entirely by fiction; the management and calculation of Hathorne, a man now branded by a legislative committee, on his own confession, to be a most fraudulent and dishonest person and a perjurer; and this falsity of so neatly balanced a return must have been known to Mr. Dunham, because he was never able to balance the bank account at any time. He and Bowman and others spent Sunday after Sunday, took inventory after inventory, and never, on any occasion, could they balance the bank concerns. How then was it possible to make a truly balanced return? He did not make it truly balance. He never could make it truly balance. He knew he never could make it balance, and this neatly balanced return is false, and he must have known it to be so. There is abundant specific proof that the return was false.

1. *The net profits on hand.* — The old books show nothing. The new ledger has the figures of the return, but is not supported by the original entries, and is a fiction for the purpose.

2. *Balances due to other banks.*

These appear by the old books to be	.	.	\$30,401 59
By the new books	.	.	1,104 86
By the return	.	.	16,369 86

Commonwealth v. Dunham.

And by the Suffolk Bank books it appears that neither of them is correct.

3. *Cash deposited not on interest.*

Old books	.	.	.	.	.	\$55,346 29
New books	.	.	.	.	.	44,921 12

The return agrees with neither.

4. *Cash deposited bearing interest.*

Old books, nothing.

New books, same as on the return, and there is no reference or evidence in the new books to support this.

5. *Total amount due from the bank.*

The return makes this less than it ought to be, because —

1. The bills in circulation were more.
2. The balances due other banks were larger and more.
3. The deposits not on interest were more.
4. The post notes were more.

In the next place, look at the return respecting the resources of the bank —

1. There is no proof as to the *specie*, more or less.
2. The item of *real estate* is wholly false. The bank had none. Witnesses say that the return relates to the safe which the bank owned, and that it is customary to put this under the head of "real estate." But no custom can make a false oath true.

3. *The balances due from other banks* were not true.

4. *Amount of debts due the bank* in the return is \$299,590 62

In the old books it is 271,823 10

In the new books it is 262,823 27

Thus making the amount in the former more than \$20,000, and in the latter more than \$30,000, less than the return has it.

If the return was false, Dunham must have known it.

1. He never made a true balance. He tried often, but

always failed ; therefore he must have known that a return apparently balanced, was false.

2. Hathorne told him that the books must be forced.

3. The books were mutilated by erasures and by cutting out leaves which are just those which affect this return.

4. A double set of books was very extraordinary.

Could the defendant have known or believed he was doing right, when he signed and swore to the return made under such circumstances ?

Sprague, for the defendant, also addressed a few remarks to the court. — Under the statute, the cashier is only to swear to the state of the bank. It was the express intention of the legislature, that the cashier should not be excused, by relying on the books, which might be incorrect. If he should swear by the books truly, and yet fail to present the true condition of the bank, he would be liable to indictment, for there is now on the files of the court an indictment against a cashier, who did make his return strictly according to the books of the bank, which had been forced ; and the gist of that indictment was, that he had not made a true return of the state of the bank. It was the directors, and not the cashier, who might be justified in swearing according to the books of a bank.

THACHER, J. I had hoped that both you and the court would have had the views of the learned counsel on both sides, in their closing argument of this very important cause, on all the points of law and fact on which they rely, and which they deem important to be weighed by you when you retire to make up your verdict. But the counsel have waived this task, and it has fallen on the court, sooner than I had expected, or is usual in trials of this character, and I fear that I may not perform the task in so full and satisfactory a manner as I could wish. If the public justice shall suffer from this cause, there is, I am sensible, no remedy. But if the result should be unfortunate for the defendant, I am happy to reflect that he will be entitled

Commonwealth v. Dunham.

to an appeal from the judgment of this court to a higher tribunal, which will take good care of the rights both of the commonwealth and of the party on trial.

On the 19th day of October, 1836, the defendant, being cashier of the Lafayette Bank, made a return, on oath, to the secretary of this commonwealth, upon the requisition of his excellency the governor, of the state and condition of that bank on Saturday, the 3d day of September preceding, at 2 o'clock in the afternoon. This requisition was made by the governor, pursuant to the 65th sect. of the 36th chapter of the Revised Statutes, and the return was made by the defendant in obedience to the same. By the 128th chapter of the Revised Statutes, sect. 2, it is enacted, that if any person of whom an oath shall be required by law, shall wilfully swear falsely, in regard to any matter or thing, respecting which such oath is required, such person shall be deemed guilty of perjury. The defendant signed his return on the 19th day, of October, 1836, and on the same day went before Hugh Montgomery, Esquire, justice of the peace, and made oath, "that the statement was, according to his best knowledge, and belief, true." The grand jury charge, in their indictment, that this return was not true, but was a false return of the state of the bank at that time; that the debts and liabilities of that bank were larger and amounted to more than was stated in that return; and that the resources were not so great as stated in it, nor of so great value as therein set forth; and that the defendant knew that the said return was not true when he took the oath, and so that he had incurred the guilt of wilful perjury within the statute.

You may reasonably expect from the court, full instructions as to the nature of the offence, and as to what the law requires should appear, before a citizen could be said to have incurred the guilt, and to have rendered himself liable to the judgment consequent on perjury.

You are to be satisfied 1st, that the oath was false as to the matter; and 2d, that it was wilfully false on the part of the

person accused. It must be shown clearly, that the false oath was taken with some degree of deliberation ; for if, upon the whole circumstances of the case, it should appear probable, that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise or inadvertency, it would be hard to make it amount to voluntary and corrupt perjury. But it would be a mistake to imagine, that a person cannot be convicted of perjury, who swears that he thinks or believes a fact to be true, knowing at the time that it was false. For, said the Lord C. J. De Grey, in one case, "he certainly may, and it only renders the proof of it more difficult." Lord Mansfield said, in another case, "it is certainly true, that a man may be indicted for perjury, in swearing that he believes a fact to be true, which he knew to be false." And in a still more recent case, the twelve judges of England declared themselves to be of the same opinion. Notwithstanding, therefore, that the defendant in this case has sworn only, that the return made by him to the office of the secretary of the commonwealth, "was, according to his best knowledge and belief, true;" yet if you believe that he knew at the time, that it was false, and took the oath deliberately, you will be bound, according to law, to say, that he has committed the offence.

It has become necessary, by the course of the defence in this case, which has been conducted with consummate ability and eloquence, for the court to refer to the section of the statute on which the return was founded, and to pronounce an opinion on the point, whether the law requires, that the cashier's return should be founded on the books of the bank.

This return is required to inform the legislature and the public of the true condition of the bank ; — whether it is solvent and deserving credit ; whether it has the means to redeem its bills, which are circulating as money ; whether its affairs are managed according to banking principles prescribed in its charter and by the law ; and whether the cashier and directors are faithful to their trust. It is the return of the cashier, and to be

signed and sworn to by him. It must be taken by him from the books of the bank ; because the law considers him as the keeper of the books, and that there is to be found in them a daily record made at the time of every transaction ; and therefore that it should be a true synopsis, drawn from the books, as from the most authentic source, of the state and condition of the bank. It is a very important document for the stockholders, who confide in the capacity and fidelity of the officers whom they have chosen to manage their concerns. In every point of view, this document is weighty in itself, and important to all concerned ; — and if it is, in any case, a fabrication, showing a false statement of the bank, exaggerating its resources, or diminishing its liabilities, it must fail to answer the purpose of the law, and can hardly fail to injure the public.

To secure the truth and accuracy of the return, the law requires that it should be verified also by the signatures and oath of a majority of the directors. Can they safely certify on oath, “ that the books of the bank indicate the state of facts so returned by the cashier, and that they have full confidence in the truth of said return,” without a personal examination and comparison of the books with the return, so far as they shall deem such examination to be necessary ? They undoubtedly have confidence in the character of the cashier, and a belief of his accuracy and fidelity in that office. But the law clearly requires from them an examination and comparison of the books with the return, to detect any latent error in this document ; that it may appear to be made public on the personal responsibility both of the cashier and the directors, and that it is their joint act. For these reasons, I infer that the law requires that the cashier's return should be founded on the books of the bank, and that it should contain a true statement of its condition at the time.

You are then to inquire whether the return was false in any material respect. Was it manifest from the books of the bank, that the return was false ? This is to be settled by you on your

responsibility, and is entirely within your province. I do not feel myself required to go into this part of the inquiry, nor have I such confidence in my knowledge of accounts, as to be able to throw light upon the subject. You will have the books with you, and will undoubtedly enter fully and carefully upon the examination. I refer you to the testimony of Charles Hickling, the present cashier, and of J. Vincent Browne, who was one of the committee of the legislature, which was appointed to examine into the condition of the bank, and who has detailed the various errors which they have detected in the examination of the books. If the return is found to vary materially from the books, that will constitute proof of the case on the part of the government; but it is open to the defendant to point out the errors in the books, and to show in that or in any other way that the return was substantially true. It is your duty, therefore, to attend to the explanations given by the defendant, in relation to the errors in the books, and with which it has been stated by his counsel, they were so full, that the return had not been predicated on the books, but had been derived from other sources. You are also to consider the excuses which have been offered in behalf of the defendant; that the entries in the books were made in the hand-writing of a person whom he employed to assist him in this department, and that, for that cause, he was not accountable for them.

Mr. Dunham was the cashier of the bank, and has been represented by the directors and by others, whom he has called as witnesses, as a shrewd, active and intelligent man, and experienced in business, and in whom they had full confidence. Before he engaged in this bank, it is testified by David Henshaw, Esq., that he had been employed for several years as an inspector in the custom-house; that he was shrewd, but better formed for action than to keep accounts, ardent, and somewhat impetuous, and always considered as an honest man. After leaving the custom-house, Mr. Montgomery says, that he was for some time employed as the agent of a manufacturing company.

It appears, that he was unanimously chosen the cashier of this bank, by his friends and neighbors, and held the office from 13th July, 1836, when the bank commenced its operations, till the month of November of that year. He was chosen a director of the bank, and continued to act as such till it ceased operation, and he has been employed and trusted on all occasions as an agent and manager of its concerns. Now, he may not have been a learned accountant, but you are to decide whether, from his talents for business and experience, he was not competent to ascertain the true amount of the liabilities of the bank and its resources, if he was desirous in good faith to make a true exhibition of the same. Although the books were not in his hand-writing, still if they were kept under his eye, by persons in his employment and confidence, he was to be considered in law as answerable for their general character ; and the cashier of a bank, under heavy bonds, as required by law, and acting in a great public concern, for the good or evil of so many, was not to be lightly released from his obligation to perform the duties which belonged to the office. If he was devoid of intelligence, and really incapable, in your opinion, of ascertaining the liabilities and resources of the bank, and of exercising a plain, common judgment in such a matter, that ought to excuse a great mistake. But if the confusion was of his own making, and arose from his own fault, you are to hold him to strict account, and to be fully satisfied of his incompetence, before you shall acquit him of wilful wrong.

If you are satisfied that the return was false in any material respect, you will then inquire whether the defendant must have known it to be so at the time. And upon this head I refer you to the testimony of Adam R. Bowman, Benjamin W. Thayer, and the Hon. Linus Child, who was chairman of the legislative committee. In connection with this you are to consider that a *new set* of books was prepared and copied from the old by Mr. Bowman, who was employed by the defendant, and compensated by the bank, and who says, that the new books were

made to correct the errors of the old books, and for the purpose of making them correspond with the return. You are to consider also the erasures, alterations and mutilations in the old books, precisely at that period which relates to the return. There was a mysterious disappearance of several of the leaves of the old book, when they were demanded by the legislative committee, which leaves did not appear again till three days before this trial. The custody of the books for a long time belonged to the defendant, and he always had free access to them, as one of the directors of the bank. The errors and mistakes occurred during his administration. If he was conscious to himself that the return was false, there was a reason why he should wish that these mute but eloquent witnesses should not appear to accuse him, and to subject him to legal account.

But his learned and eloquent counsel says, that, discarding the books entirely, the return is substantially true, and that it gives a fair exhibit of the condition of the bank at the time. You will therefore consider all the testimony relating to this point, and if you are satisfied that the return is true in this respect, though it may not be indicated by the books, then you are bound to acquit him of the accusation; because he is on trial for swearing to the truth of a return alleged to be false.

You represent the whole people of the commonwealth, and are bound by a sacred obligation to be true to the law. You are here by the will of the law, and not of your own choice and seeking. If you believe that the return was false, that the defendant knew it to be so at the time, and deliberately and wilfully made oath to it, you must find him guilty. But if you have a reasonable doubt on your minds, after a candid and unprejudiced view of the whole evidence in the case, as to either of these facts, it will be your duty to pronounce him innocent.

The jury found the defendant guilty.¹

¹ Immediately after the verdict, the counsel for the defendant claimed, on his behalf, an appeal to the supreme judicial court. But the defendant was

APRIL TERM, 1838.

COMMONWEALTH v. JOSIAH DUNHAM, EBENEZER STEVENS, SAMUEL S. RIDGWAY, THOMAS H. DUNHAM, AND EBENEZER HAYWARD, DIRECTORS OF THE FRANKLIN BANK.

COMMONWEALTH v. ISAAC O. BARNES, SERIAH STEVENS, AMASA G. SMITH, OTIS DRURY, MARCELLUS BOWEN, AND GEORGE PAGE, DIRECTORS OF THE LAFAYETTE BANK.

Under the Revised Statutes, c. 36, s. 65, the president and directors of a bank may be joined in an indictment for making a false return.

Where a duty is imposed by statute upon the officers of a corporation, as an official act, and for a public purpose, they are thereby constituted officers for that purpose, and a wilful disobedience on their part is a misdemeanor. An indictment under the Revised Statutes, c. 36, s. 65, against bank directors, for making a false return of the condition of a bank, must allege that the false return was made by them wilfully; otherwise the indictment will be quashed, as setting forth no offence constituting a misdemeanor at common law.

THE defendants in each of the above cases were indicted under the Revised Statutes, c. 36, s. 65, for signing and swear-

not ready with his sureties, and it was understood, at the time, that he would appear on the 16th day of April, to enter into such recognizance as the court should order, or to submit himself, at that time, to custody, if he should fail to produce sureties. The right to appeal was not denied. But the defendant did not appear in court on the 16th, and, on motion of his counsel, further time was allowed until the 21st day of April, for his appearance; but not appearing then, his default was recorded; and on the 26th day of that month, being the last day of the term, his recognizance was, on motion of the county attorney, ordered to be estreated. No order was made by the court respecting the appeal claimed, by reason of the failure of the defendant to appear. On the 26th day of August following, the defendant's counsel filed a motion in court, that the defendant might be permitted to offer sureties and perfect the appeal; but, as the defendant did not appear in person in court, and as it was not understood that he was to appear, the court refused to pass any order on his motion. The right of the defendant to appear by counsel was not claimed or argued. This refusal of the court was made the ground of a

ing to a false certificate of the state of the bank of which they were directors. The section of the statute upon which the indictments were founded, is as follows : —

“The cashier of each bank shall, in every year, make a return of the state of such bank, as it existed at two o'clock in the afternoon of the first Saturday in such preceding month as the governor may direct ; and he shall transmit the same, as soon as may be, not exceeding fifteen days thereafter, to the secretary of the commonwealth ; which return shall specify the amount due from the bank, designating, in distinct columns, the several particulars included therein. (Here is set forth the form of the return.) Which return shall be signed by the cashier of such bank, who shall make oath, before some justice of the peace, to the truth of said return, according to his best knowledge and belief ; and a majority of the directors of each bank shall certify and make oath, that the books of the bank indicate the state of facts so returned by the cashier, and that they have full confidence in the truth of said return ; and no further return shall be required from said banks.”

The indictment, in each case, charged that the defendants, in making a return of the state of the bank on the first Saturday of September, 1836, did not examine the books, and did not ascertain the truth of the return, and that, without any such examination, and without knowing the state of the books, they made and swore to the certificate, and that the return was false. The indictments were found at the February term of the court, 1838, and continued, from term to term, until April term, 1838, at which term the defendants in each case filed the following motion : —

“The said defendants having heard the indictment read, here move the court that the same be quashed, because the

bill of exceptions, and carried to the next term of the supreme judicial court ; where it was decided that an appeal could not be sustained. See *Commonwealth v. Dunham*, (22 Pick. 11.) — The defendant was pardoned by Governor Everett, before sentence, April 10th, 1839.

Commonwealth v. Dunham and others.

matters and things therein set forth and alleged, describe no offence which is such at common law, or by any statute of this commonwealth; and that if there be any offence therein set forth, it is not one for which the defendants are liable to be indicted jointly, but severally only, and that a joint indictment cannot be maintained therefor."

Parker, for the commonwealth.

Cruft, *B. Sumner*, *Hallett*, and *Sprague*, for the defendants.

Hallett, after a brief opening by *Cruft*, argued as follows :

This is a case of first impression, and must be decided on general principles. It is the first prosecution, in this form, ever brought in the courts of this commonwealth, or of any other state or country. It is, therefore, peculiarly the right of the defendants to be heard on a preliminary motion to hold them to answer no further, unless it shall plainly appear to the court that the allegations set forth in the indictment, if true, (as for the purposes of this argument we must admit them to be) do constitute an offence known to the laws of the land. I am aware that the court has, in another trial, intimated an opinion that here is an offence for which the parties may be held answerable; and I am also aware, that a preliminary motion to set aside an indictment, before trial by a jury, on general legal principles, and not technical informality, is rarely favorably received, in this stage of a prosecution, on the ground that the jury may determine the law as well as the fact, and the party, if convicted, may carry the question of law to a higher tribunal. But I contend that the defendants have a clear constitutional right to a preliminary decision on this motion, before they shall be put to trial for the issue. "No subject," says the bill of rights, "shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him." Hence, if the allegations set forth in the form of an indictment, do not plainly describe a crime or offence known to the laws, the party shall not be held to an-

swer, and is entitled to be discharged at the earliest stage of the proceeding, in which a motion to that effect can be presented to the court.

The alleged crime or offence must be "fully, plainly, substantially, and formally described," and to such only shall the citizen be held to answer; but how can there be such description as the constitution contemplates, if the matter described may all be true; and yet constitutes no offence known to the laws? On this point there must be no doubt. The party shall be held to answer only to that which is clearly and plainly a crime. On this ground, the court, in deciding the preliminary question, if there be a crime or offence substantially *charged*, stands to the defendant somewhat in the relation the jury of trial stands, in a matter of doubt as to the accused. In either case the party is entitled to the benefit of the doubt: for it is as manifestly a wrong done to the rights of the citizen, to be held to answer, criminally, for what is no offence at law, as to convict him of an offence not proved upon him. It is conceived, therefore, that if the court be not fully satisfied that here is an offence set forth in the indictment, the constitutional immunity of not being held to answer, directly applies, and must be solemnly regarded by the court, as enjoined in the oath of office, to administer justice according to the constitution and laws of the commonwealth. For these reasons the candid attention of the court is earnestly solicited to the inquiry, whether the defendants stand here charged with any violation of law, for which they can be held to answer in a criminal prosecution.

What, then, is the offence charged? It is called an "official misdemeanor" in the defendants, as directors of a bank and public officers, and is thus described in the indictment: "By *signing* under their hands said certificate, on the false return of the cashier, and *without examining* the books of said bank, and *without knowing* whether said return was true or false, were guilty of, and committed the crime of official misdemeanor, and of criminal neglect of duty in their office of directors of the

Lafayette Bank, and by certifying the state of said bank to be more favorable to its credit than it was in truth, and thereby deceiving the secretary, the cashier, the legislature and other citizens, against the peace of the commonwealth, and contrary to the form, force and effect of the statute in such case made and provided." The court will notice, that throughout the description of the offence, there is no wilful or corrupt intent alleged, without which there can be no offence at common law. In this alone the indictment is fatally defective, if it charges a crime which is such only at common law, and not by statute. Signing a bank return or any other paper, true or false, if done ignorantly, not wilfully, and with no intent to injure or deceive, is no offence at common law.

The indictment sets forth the fact that the defendants made oath to this false return; but this is not the offence charged, which would be perjury and not misdemeanor, and must be averred to have been done *wilfully* and not *ignorantly*. Consequently, whether the return be true or false, making oath to it is no offence charged in this indictment.

1. The only act alleged is *signing* the certificate of a false return. The *signing* is no offence, for this is required to be done by the 65th section of the 36th chapter concerning banks.

2. Certifying the condition of the bank to be more favorable than it was, and thereby deceiving the secretary, legislature, &c., is no offence at common law, because it is not alleged to have been *wilfully*, but ignorantly done. The intent is wanting, for the indictment avers it was done without knowledge whether the certificate was true or false.

3. It is not cheating by false pretences, and if it were, that is no offence charged in this indictment. Neither is a conspiracy to make a false return, charged here.

There is, then, no positive act that is charged as an offence, but only an omission or neglect, and this not wilfully, but solely "without examining the books." The analysis of the matter described in the indictment, comes to this result, as the only offence charged, namely, "without examining the books."

Is this omission indictable as a misdemeanor at common law? But one principle of the common law, embracing misdemeanor, can apply to this act of certifying on the part of the directors, and that is the rule that a contempt of a statute may be punished as a misdemeanor. But even contempt of statute must be averred to be a wilful disobedience or neglect, otherwise it is no offence. The certificate is required by an order of the governor, under a statute. To make the certificate is to obey, not to condemn the statute. The statute, in this respect, is complied with, and it nowhere enjoins an examination of the books by the directors, before certifying to the return. To constitute a contempt of a statute, there must be a violation or wilful neglect of a positive injunction or prohibition in the statute. There is then no contempt of the statute. The offence, if any, must be the act of wilfully certifying and making oath to a false return, not the precise mode and means used, or neglected to be used, in getting at the form and items of the return. It would surely be a great stretch of judicial power to punish criminally, for ignorant or careless neglect of a duty, merely remotely implied or inferred, not enjoined in the statute, and to the neglect of which no penalty is attached.

I deny, in the first place, that the statute makes the matter described in this indictment, an offence; and if it did, it not being an indictable offence, which before existed at common law, the court cannot go out of the statute to seek a punishment at common law to apply to it. The rule is laid down in *King v. Wright*, (1 Burr. 547,) that "whenever a statute makes a new offence and appoints a particular mode of proceeding, an indictment will not lie. Neither will an indictment lie where the act is not prohibitory, but only inflicts the forfeiture and specifies the remedy." The bank act, under which this indictment is brought, creates certain offences which were not such at common law. Can the court go to the common law to punish what was not punishable before the statute, and which the statute does not punish, unless there is a contempt of statute,

Commonwealth v. Dunham and others.

by refusing to comply with its express injunctions, or violating its express prohibitions? There is no injunction in the bank act, that the directors shall examine the books and compare the returns before certifying, and no prohibition that they shall not certify without such examination.

The only offence charged in the indictment is not examining the books, and comparing the return with them. If this be an offence, how much must the directors examine and compare? With how little examination can they escape conviction? Shall it be one book or all the books? Will the ledger do, or must they go back to the blotter? Must each director personally examine for himself, or may a general statement, made by others who have examined, be sufficient for him to certify upon? Will you measure the capacities of the directors, and punish one, who has examined more than others, and yet after all knows nothing about the matter, for the reason that he did not know how to examine and compare for himself? The most minute examination does not preclude crime. It may be made carefully, and yet for the very purpose of devising a false return, which is wilfully sworn to, knowing it to be false. Is not, then, the only test of crime, in this particular, a false return knowingly testified to; and that would be perjury, and nothing less. The false return, sworn to *wilfully*, and with a corrupt *intent*, and not ignorance of banking or neglect to examine the books, more or less, is the only offence punishable under the statute, and that offence is punishable, not because it is a violation of any injunction or prohibition in the statute, or a crime at common law, but because it is *perjury*.

But even if neglect to examine and compare with the bank books, be an implied violation of the 65th section of the statute, the statute itself inflicts the forfeiture and specifies the remedy, and therefore the common law cannot step in to impose another punishment. If a false oath is wilfully taken, it is perjury, and is to be punished as such, and this is the only punishment for crime in the making and certifying to a bank re-

turn, which the law contemplates. For all other neglect, or nonfeasance or misfeasance in bank officers, the forfeiture and penalty and mode of procedure are prescribed in the 40th section of the bank act. By that section, the legislature may appoint a committee to examine into the doings of any bank, and if, upon a hearing, the legislature shall determine that the bank has exceeded its powers, or failed to comply with any of the rules, restrictions and conditions provided by law, its charter may be declared forfeited. Here, then, the statute "inflicts the forfeiture and specifies the remedy," and in such case the common law declares we shall not go out of the statute for a penalty or forfeiture, and an indictment will not lie. The statute must be strictly followed. That statute has created a proper tribunal to try such offence—the legislature itself, through a committee, and not courts of law assuming to extend a common law jurisdiction over the case. The legislature reserves this visitorial right, and has nowhere given it to courts of law, so that it would manifestly be a conflict of jurisdiction for the courts to interfere. The refusal to pay specie for bills on demand is an express violation of the statute. Is it an indictable offence? Clearly not, because the statute inflicts the forfeiture and prescribes the remedy. One branch of the legislature has acted on this very case, and by a vote of two hundred and fourteen to fifty-one, in the house, has declared that the banks have forfeited their charters by neglecting and refusing to pay specie. The learned attorney for the commonwealth does not, I venture to affirm, hold this to be an indictable offence, nor have any grand jury thought of presenting it as such. So if it be any offence under the statute to neglect or refuse to examine the bank books, before certifying to a bank return, that offence is punishable, if at all, by a forfeiture of charter, and the legislature, through a committee as the visiter of corporations, and not the courts, is to hear and decide.

A mere neglect of duty in bank directors is an official mismanagement, but not an official misdemeanor. Had this plain

distinction been regarded, these indictments would never have been brought here.

The form of the indictment charges nothing but official mismanagement, and is devoid of the *animus*, the wilful intent, without which there can be no legal crime, unless the statute expressly punishes carelessness or neglect, with no reference to the intent. The statute, section 30, points out what is official management, and prescribes the penalty. If any loss of stock shall arise "from the official mismanagement of the directors," the stockholders shall, in their individual capacities, be liable to the amount of their stock. Section 33 extends the same penalty to corporations holding bank stock. Neglect to examine the books, neglect to keep proper accounts, carelessness, ignorance or indiscretion, in making up or certifying to returns, in the absence of wilful intent, are official mismanagement, and nothing more; and if the corrupt intent be joined, then the certifying on oath to a false return, no matter how it may be made, is perjury, and nothing less. There can be no intermediate offence, called an official misdemeanor, at common law.

We have seen that where a statute prescribes duties or prohibits acts, and affixes forfeitures and penalties in matters not before recognized as offences at common law, we cannot go out of the statute to find a punishment at common law. Apply this to the bank act. That statute affixes forfeiture or penalty to every act it forbids or enjoins. Whenever it enjoins an oath, if a false oath be wilfully taken, that is perjury, an offence against public justice. But even such perjury is not punishable at common law, because it is *coram non judice*, not a judicial oath before a court. It is punishable by express statute. "If any person of whom an oath shall be required by law, shall *wilfully* swear falsely in regard to any matter or thing, respecting which such oath is required, he shall be deemed guilty of perjury." (Rev. St. c. 128, s. 2.) Without this general statute, even a wilful oath to a false bank return would not be an

offence at common law. In the absence of all provision by statute, shall the common law come in to create a misdemeanor out of a mere neglect to examine the books of the bank? All the misconduct of bank directors, not coming under the definition of perjury, has attached to it a specific penalty or forfeiture. No duty is enjoined, and no act prohibited without such specified punishment.

[This position was illustrated by referring to every duty enjoined upon directors by the statute, and showing that either a specific penalty was attached to each, or a general penalty of forfeiture of charter.]

Whenever the act intends to create a misdemeanor or a crime, other than perjury, it expressly says so: "If any officer of a bank shall refuse or neglect to exhibit to a committee of the legislature any books or property of the bank, or shall in any way obstruct the examination thereof by such committee, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding ten thousand dollars, or imprisonment not exceeding three years." (Sec. 41.) Here a mere refusal or neglect, whether wilful or not, is expressly created a misdemeanor. Is it not plain, then, that if the legislature had intended that any other neglect, such as neglecting to examine the books, should be punished as a misdemeanor, the statute would have said so? The defining and affixing the penalty of misdemeanor in one case of neglect, and omitting it in another, in the same statute, is an exclusion of a conclusion that the neglect in the latter case is to be punished as a misdemeanor. On what general principle, then, can the court go out of the statute for a punishment of an act or an omission to which the statute affixes neither penalty nor forfeiture, and which is not a contempt, that is a wilful disobedience of the statute? Take, for instance, embezzlement of the funds of a bank, by an officer entrusted with them. At common law this would be only a breach of trust, but by a general statute, (Rev. St. c. 127, s. 27,) it is provided, that if any officer or agent of a bank shall em-

bezzle or fraudulently convert any property, &c. of the bank, he shall be deemed to have committed the crime of larceny in such bank.

The conclusion must follow, from these premises, that a neglect to examine the bank books before certifying to a return is no crime by the statute. But if it were a crime, by the statute, it could only be punished according to the statute by a well-settled rule of the common law, that where a statute creates a crime, which was not previously an offence at common law, we cannot go out of the statute for a punishment. "Where the offence was punishable *before* the statute, the statute prescribing a particular method of punishment is cumulative; but where the statute makes an act punishable that was not punishable before, it is necessary that such particular method, by the act prescribed, be pursued." *King v. Robinson*, (2 Burr. 805.) This covers the whole of the case at bar, and excludes the intervention of the common law. Clearly, then, the indictment sets forth and describes no offence that is such by any statute.

Secondly. The indictment describes no act which is an offence at common law. A mere neglect of duty is not an offence *per se*. An office cannot be forfeited by a bare *non user*. (1 Hawk. P. C. c. 66, s. 1.) A man cannot commit forgery by a bare non-feasance, as by omitting a legacy out of a will. (1 Hawk. P. C. c. 70, s. 6.) A bank return must be made by a majority of the directors. If four out of seven directors should omit to use their office as bank directors, no return could be made. That would be a violation of the statute; but in applying the penalty, it being no offence at common law not to sign a bank return, the particular method by the act prescribed must be pursued, and for such neglect the statute punishes the bank, not the directors, by section 66, which provides that every bank neglecting to comply with the statute upon the requisition of the governor as to time, to make an annual return, shall forfeit to the use of the commonwealth one hundred dollars for each

and every day's neglect. The corporation might, perhaps, have its action on the case against the directors for neglecting to make the return, but the only penalty the act imposes, to be enforced by a public prosecution, or action, is the forfeiture of one hundred dollars for each day's neglect, and this amply provides for the enforcement of the requisition, which is all that public policy in this case requires. So if three out of seven directors should comply with the statute, and should carefully examine the books and certify to a return, still it would be no return, and the bank would forfeit the penalty. The statute is not cumulative, because to neglect to make a bank return was not, before the statute, an offence at common law, and therefore the only penalty or forfeiture that can be enforced is that expressly prescribed in the statute, namely, a forfeiture of one hundred dollars for every day's neglect to make a return.

Thirdly. The indictment charges as an *official misdemeanor*, what is not a misdemeanor, either officially or otherwise. In general, a misdemeanor is an act committed or omitted in violation of a public law, either forbidding or commanding it. (4 Bl. Com. 5.)

1. The matter charged in this indictment is not forbidden or enjoined by the bank act. It is undoubtedly sound doctrine, that whenever a statute prohibits a matter of public grievance to the liberty and security of the people, or commands a matter of public convenience, an offender is punishable, by way of indictment, for contempt of its enactments. *State v. Fletcher*, (5 N. H. Rep. 257.) But this only applies to positive enactments, where no penalty or forfeiture is affixed by the statute. If there be a prohibitory clause, the indictment will lie on the prohibitory clause, as in the case of exercising the business of a taverner without license. In the case at bar, there is no prohibitory clause.

2. Neither is the matter charged a misdemeanor at common law, because it is no violation or neglect of a public law. The

bank act is a private and not a public law. It is, in effect, a part of the bank charters, which are private acts of incorporation, for private uses. They are merely lay corporations, not municipal corporations. The doctrine held by the courts of this commonwealth, is that bank charters are contracts and vested rights, and that no general law, without express reservation, or the consent of the corporation, can be made to vary the terms of that contract, without express forfeiture. A public law must apply to the whole community. In 12 Pick. 334, the court decided that the law concerning pilots was a public law, because there were no exceptions to its application. If it had applied to a particular class of pilots and not to others, it could not be a public law, but a special law.

The bank law, by the constructions of the courts of this state, is in fact but a part of the bank charters, which are private and special acts. No bank, created since 1835, it is held, comes under that law. In point of fact, on the construction given to bank charters by our courts, this bank law applies to but twenty-five out of one hundred and thirty banks in the commonwealth. The legislature has recently consumed weeks in an ineffectual attempt to bring the exempted banks under the provisions of the bank act. How, then, can this be a public law which the legislature cannot make general without the consent of private corporations; a law which not only applies merely to a particular class in the community, but to only a small portion of that particular class. Hence the bank-act is in the nature of a private and not a public law, and an offence against it is not an offence against public justice. "Public wrongs or misdemeanors are a breach and violation of the public rights and duties, due to the whole community, considered as a community in its social, aggregate capacity. — Private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals." (4 Bl. Com. 5.) No injuries of a private nature are indictable, unless they in some way concern the king. (1 Russ. on

Crimes, 61.) Now the only public injury, connected with a bank return, is, that it be a false return. It is the making a false return, not the manner of arriving at it, which constitutes the injury and the offence. No matter how the return is got at, whether with or without examining the books, if it be true, there is no injury, consequently no offence. If it be false, no matter how carefully the books have been examined, the injury is done to the public, and if it be *wilfully* done, then it constitutes perjury. For all other omissions or acts, under the statute, there is provided pecuniary forfeiture, or special damage in a civil suit. On what doctrine of common or uncommon law are men to be indicted for the mental process by which they arrive at certain mathematical results?

The utter absurdity of this indictment is shown by a single consideration, namely, that the only injury to be complained of is a false return, and yet the directors of the Lafayette Bank are indicted for not conforming the return to the condition of the books, when, had they done so, the books being false, they must have made a false return. So that, in point of fact, they are indicted for a misdemeanor in not having committed perjury. Had they examined the books and made this false return, it would have been wilful perjury; not having examined the books, they have sworn to a false return, without knowing whether it was true or false; and yet they are indicted, not for the false return, but for not having conformed it to false books. Had the learned attorney reflected on this plain distinction, with his usual sound and discriminating sagacity, I am persuaded he never would have drawn that indictment. It would have been an indictment for perjury, or nothing. It is true that ignorance of the law excuses no man, but ignorance of banking is not a crime at common law or by statute. The defendants are not indicted for ignorance of the law, for they complied with the terms of the statute, but for ignorance of their business, and of the false items to which they certified. This may have been negligence, error, or indiscretion, but is not

Commonwealth v. Dunham and others.

a misdemeanor. The distinction is manifest between error and crime. Thus, "where a justice has committed an involuntary error, without any corrupt motive or intention, it has been questioned whether it is an indictable offence on the ground that the act in that case is either null and void or the justice is answerable in damages for all its consequences." (1 Russ. on Crimes, 214.) If neglecting to examine bank books be a misdemeanor as of a public officer, would not the same rule make it a misdemeanor in every judge in the land who should be proved to have given false judgment in a matter of law without examining the legal authorities? Where are these sort of indictments to stop, if, in the absence of statute law, or even settled practice in the courts, the common law is to be stretched so as to cover every supposed matter of delinquency which the popular excitement of the hour, the over-eagerness of a grand jury to make an example of somebody, or the disposition of the court to amplify its jurisdiction, may seize upon as deserving punishment, though the law has neither created the crime nor provided the punishment?

A general principle is involved, in this case, of vastly more importance to public liberty and private security, than the punishment of a few bank directors. *Shall a citizen be tried on a charge, which no law in the land has previously made an offence?* This great question of right is so nearly involved in the issue now before the court, that the question, whether the defendants have or have not done wrong, is wholly absorbed in the higher question, whether acts, not declared crimes, may be transformed into crimes, without legislation, by the intervention of a grand jury, the opinion of the prosecuting officer, and the will of the court. There can be but two sources of laws to prescribe what are crimes; the constitution or legislative enactments. The common law of England has no force here, only by virtue of the sixth section of the constitution: "All laws *heretofore* adopted, used and approved, and *usually practised on* in the courts, shall still remain and be in full force." If our judges

mean to respect the constitution they are sworn to obey, it is manifest that in the absence of legislation, no act or neglect can be treated by the tribunals of justice as a crime, unless it is shown to have been made a crime by some law, which, *before* the adoption of the constitution of this state, was "adopted, used and approved, and usually practised on in the courts." The disregard or evasion of this plain provision of the constitution will destroy the confidence of the people in the judiciary, without which judges or courts cannot exist in this country.

Hence, a conclusive answer to this whole indictment is, "show us, in the absence of all legislative acts, any practice in the courts of this commonwealth, previous to the adoption of the constitution, which punished, as a misdemeanor, neglecting to examine bank books, before certifying to a return made under oath?" If no such practice before the constitution is shown, then any act of a court, even in trying the matter falsely set forth as a crime, is an act in direct derogation of the constitution and laws of the land. Instead of having a settled criminal code, without which there can be no liberty, it would be the *judge*, and not the *law*, who would try and punish whatever he and the prosecuting officer choose to hold deserving punishment. Can any conclusion be plainer, than that which follows from these positions, in the present case? The matter which is set up in the indictment, could in no form have been an offence, previously to 1828, for bank returns had no existence till that year, when bank directors were first required to make returns, though banks had existed in this state for more than forty years before. Would it not, then, be the most absurd fiction of law ever devised, to assume, in the absence of legislative enactment, that, by the practice of our courts, under the common law, previously to 1780, not examining bank books to make a return was *usually* practised on as an indictable offence, when the whole subject-matter of the alleged offence had no existence until 1828?

These grounds are sufficient to show that this indictment

Commonwealth v. Dunham and others.

must be quashed. It is in the discretion of the court to say whether it shall be done in this stage of the proceeding, or the parties and the commonwealth be put to a useless trial on a matter which is no crime, and cannot become such until the legislature so enact.

But the indictment is fatally defective on another ground. It avers that the defendants, as bank directors, are *public officers*, and as such committed the alleged crime. This, we deny, has any foundation in law. Bank directors are mere officers of private corporations. They receive no commissions, take no oath of office, give no bonds, hold no trust derived from the constituted authorities. They are not public officers at common law, and, besides, it is denied that the rules of law applicable to public officers in Great Britain, ever were adopted or practised on in this commonwealth. They are no part of our common law, and are directly adverse to the spirit and genius of our popular institutions. The nature of our government forbids the existence of any public office not created by the constitution or legislative enactment. The common law recognizes no public officers of private corporations, for private corporations were unknown to the common law. The absurdity cannot be entertained that there shall be public officers of private corporations, like banks, which are mere favored copartnerships for the pecuniary benefit of the shareholders, who appoint agents and managers of the business for their own profit.

The broadest doctrine of the common law is, that "a person holding a public office, under the king's letters patent, or derivatively from such authority, is amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it." (1 Salk. 330, note *a*, cited in 6 East, 130.) So, "if a man be made an officer by act of parliament, and misbehave himself in his office, he is indictable. Any public officer is indictable for misbehavior in his office." (5 Mod. R. 96; 6 Mod. R. 96.) All the cases under this rule, are of offices derived from the sources of power, the king and parliament, and

created as public offices. No public office can exist in this state, that is not created by the constitution and the laws. There are no resulting, inherited or constructive offices known to our system of government. The fifth article of the constitution of Massachusetts, defines public officers: "All power residing in the people, and being derived from them, the several magistrates or officers of government vested with authority, whether legislative, executive or judicial, are their substitutes and agents, and at all times accountable to them. Article 8th declares, "the people have a right to cause their public officers to return to private life, and to fill up vacant places, by certain and regular elections and appointments." How then can there be any public officer, under the constitution, without election by the people, or appointment by the constituted authorities; and from what source, but the constitution, can the power to create offices be derived? In Great Britain, offices exist as independent, inherent, and vested rights and privileges. The common law, relative to public offices, is founded on a system totally adverse to the fundamental basis of our government, that all power resides in the people, and is derived from them. As well might the common law, touching the king's prerogatives, be claimed to be in force in this commonwealth, as the common law relating to public officers. Consequently, there can be no such office, as a constructive public office, known to our constitution and laws.

Again, the second article of the sixth chapter of the constitution, on the incompatibility of offices, declares that "never more than any two offices, which are to be held by appointment of the governor, or the governor and council, or the senate or house of representatives, or by the election of the people of the state at large, or of the people of any county, military offices, and the offices of justice of the peace excepted, shall be held by one person." This general provision includes all public offices created under the constitution. Municipal officers of towns existed before the constitution; and these municipal

Commonwealth v. Dunham and others.

rights are expressly recognized by the constitution, and also by the 15th chap. s. 33, which establishes what shall be held to be public offices of such municipal corporations.

It must follow, then, that if bank directors are public officers, no person can, under the constitution, hold two other public offices, and be a bank director. And yet, there are several members of the legislature who are county and city officers, and also bank directors, making three offices, if the latter be a public office. One gentleman, a member of the senate, is a senator, which is one office, district attorney, which is another office, and a bank director. If this indictment is sustained, on the ground that bank directors are public officers, a writ of *quo warranto* must lie, to remove these gentlemen from one or the other of the three offices; for the constitution declares that no person shall hold more than two. If bank directors are public officers, because they are selected by stockholders in, or members of private, lay corporations, created by the legislature, then all officers of corporations are public officers. The general law, as to corporations, chap. 44, gives power to corporations to elect all necessary officers. It can never be sound policy to multiply constructive crimes, in the manner it is now attempted to do, by the doctrine contended for, on the part of the prosecuting officer. Directors of railroads, of savings banks, of insurance companies, and of manufacturing corporations, are required to make returns and certificates under oath. Are these all public officers, and liable to indictment for official misdemeanor, in ignorantly certifying to a false return, without an individual examination of the books of the corporation, by each director?

Directors of manufacturing corporations are required to publish, annually, the amount of assessments and debts. Is the neglect to do so an official misdemeanor? If it be so, the directors of nearly every manufacturing corporation in the state are annually liable to indictment, for they do not publish these statements at all. The law provides the penalty of neglect,

which is the private liability of each stockholder ; and precisely in like form, the law provides the penalty of neglect in bank directors, namely, the liability of stockholders, and the forfeiture of one hundred dollars, for every day's neglect, by the bank. Even a public employment is not a public office ; but directors of banks are not engaged in a public employment, but in the management of the funds of private corporations, for private emolument. In 2 Bailey's S. C. Rep. 520, it is decided that the legislature alone, can create a public office ; nor will the recognition by the legislature of an employment, established by the executive, constitute such employment a public office ; and it was held, that the place of captain of a magazine guard, appointed by state commissioners, on public buildings, is not an officer. To the same point is 3 Green. Rep. 481. The only doctrine laid down in any of the books which embraces the case at bar, is the sort of dictum interpolated in the law dictionaries, that " every man is a public officer who hath any duty concerning the public." The authority uniformly cited for this, is the case of *King v. Burnell*, (Carthew's Rep. 489, cited in 5 Mod. 431.) There is no such decision in that case. The point in that case was, whether Dr. Burnell, who was a papist, could exercise the office of censor of the Medical College. The court made no decision in the matter, and it was adjourned on hearing the argument of counsel, and there the case ended. The dictum which is incorporated into the law dictionaries, is only a remark made by one of the counsel.

Another principle of the common law may be attempted to be pressed into the case, and that is, that whatever relates to the king's revenue is in the nature of a public office. But bank returns do not relate to the public revenue. The tax on banks is assessed on the capital stock, which does not depend on false or true returns, annually required of the banks. Neither does it relate to the public currency. Bank-bills are not legal currency ; they are not a legal-tender, and are not money, but simply the notes of private corporations, which banking corpo-

Commonwealth v. Dunham and others.

rations are empowered to issue under prescribed restrictions. Again, if bank officers are public officers, it must follow that state banks are unconstitutional; for if the state imparts a portion of its sovereignty to banks, and constitutes directors public officers and agents of the state, then the bills they issue are *bills of credit* within the meaning of the constitution. No state can emit bills of credit, and what it cannot do of itself, it cannot do by agents and public officers.

This point is distinctly decided in the great case of *Briscoe v. Bank of Kentucky*, (11 Pet. 266,) determined at Washington, in 1837, involving the question, whether a bank incorporated by a state, with authority to issue its notes, is a violation of the prohibition to the states, against emitting bills of credit. The Commonwealth Bank of Kentucky, was incorporated in 1820, as a state bank; the directors were appointed by the legislature, the bank was exclusively the property of the commonwealth—the state being the only stockholder—the capital stock of two millions was to be paid in from proceeds for vacant state lands; bills of the bank were issued in the ordinary form, but the directors were in no way liable; the notes of the bank were to be received on all executions, or if refused, the judgment to be delayed for two years. *Briscoe* and others refused to pay a note discounted by this bank, on the ground that it was given for the notes of the bank, which were bills of credit, issued by the state, and therefore, the act establishing the bank was unconstitutional. In the argument for the defence, it was urged that this was a state bank, that its officers were state officers, meaning public officers, and that notes put in circulation by state officers, were, in fact, issued by the state, the promise being of the state to pay, by its agents, for which purpose the directors were special officers. (pp. 281, 308.) The supreme court decided that the act was constitutional, except making the bills a tender on execution, and the notes of the bank were not bills of credit. To constitute a bill of credit within the constitution, it must be issued by a state, on the

faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and is so received in the ordinary business of life. This decision settles the question as to the constitutionality of all state banks, and expressly on the ground that they are private and not public corporations or agencies, and that their bills are nothing more than the notes of individuals, and do not constitute the currency. The court say, that by the constitution, the currency, so far as it is composed of gold and silver, is placed under the exclusive control of congress; and if the paper medium (as contended) was intended to be made subject to the same power, it must follow, as a necessary consequence, that all banks incorporated by a state are unconstitutional. This doctrine is startling, as it strikes a fatal blow against the state banks, (p. 317.) The court then go on to show that the inhibition in the constitution, does not apply to acts of incorporation by states, and that bills of credit do not include ordinary bank notes.

Now, if the ground contended for by the prosecuting officer, in this indictment, be correct, namely, that bank directors are public officers, and banks public and not private corporations, it follows, that the bills issued by them, are bills of credit, and consequently, every bank charter is unconstitutional. But the decision above cited, expressly negatives this position, and in a case, too, where the bank was owned by the state, and its officers directly chosen by the legislature. The court say, "as a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator." There is still less of official character or sovereignty imparted to a bank, where the state is not a joint corporator, and holds no interest. In 3 Pet. 318, the court say, "if a state imparted any of its sovereign attributes to a bank, it would hardly be possible to distinguish the paper of such a bank from bills of credit." On these grounds, the court, in the case of *Briscoe v. Bank of Kentucky*, decide that the bank is not the state nor the agent of the state, but is precisely the same, as if the stock were owned

by private individuals, and hence its notes are not bills of credit. (p. 325.) Judge Story, who alone dissented, and contended that congress had power over a paper currency, was nevertheless, obliged to take the ground, that state banks were private corporations, to avoid declaring their existence unconstitutional. He says, "the states may create banks, as well as other corporations, upon private capital, and may rightfully authorize them to issue bank bills or notes as currency ; subject always to *the control of congress*, whose powers extend to the entire regulation of the currency of the country." (p. 349.) He further says, that private persons, private partnerships, or private companies, are not prohibited by the constitution from issuing bills of credit.

It follows then, that if our state banks are public corporations, and our bank directors public officers, the bills they issue are bills of credit, and our banks are all unconstitutional. To this dilemma must the government be driven, if it insists upon prosecuting bank directors for official misdemeanor, as public officers ; and should the question at bar be carried to the supreme court of this state, that court will have no alternative but either to quash this indictment, or by sustaining it, declare that bank charters are violations of the constitution, and bank notes, bills of credit, issued by public officers.

I will consider but one remaining point ; the policy of the law. The court has said, in another trial, (*Commonwealth v. Dunham*, ante, p. 519,) that a false return of a bank cannot but be an injury to the public. Granted ; but will the court, in the absence of law, assume to punish a supposed offence, on general grounds of public policy, because it is an injury to the public ? This would be to give to the judiciary power, concurrent jurisdiction with the legislative power. The courts are to interpret, and apply known existing laws, not to create them. If new offences, or acts injurious to society spring up, against which no law is provided, is this court or the legislature to make such injuries crimes, and declare their punishment ? No matter

how odious or injurious an act may be, the judiciary has no concern with the question of policy or expediency, as to its punishment. Is it made a crime, by clear, distinct, well-settled law? Beyond this, no judge can go, without a manifest violation of his oath to obey the constitution and the laws. Liberty will be of little worth, when it depends upon the frailties, the impulses, or the passions of judges, to raise into the dignity of a crime any act they may suppose injurious to the public. Wherever this has been attempted, and in whatever form, it is nothing less than judicial tyranny, and should be resisted by a free people as would be any other despotism. Even the courts of this commonwealth, as far as they have gone in creating constructive crimes, under the broad covering of the common law, have not assumed to make public policy a ground for declaring injurious acts to be crimes. Even Judge Parsons, in 1809, declined making cheating by false pretences, a common law offence, because the common law only applied to cheats by false tokens, weights and measures. Since then, in 1815, the legislature made cheating under any false pretence, a crime.

So in the matter at issue, if the legislature deem the neglect of bank directors to examine the books a public injury, it rests with them to declare the crime, and prescribe the punishment, and not with the courts. Surely the constitution meant something, when it said that the judiciary power should never interfere with the legislative. The question of policy then, rests exclusively with the legislature. If they do not prescribe punishment for a supposed injurious act, it must be because the only law-making power does not regard the act such as sound policy requires should be made a crime. "It is not the policy of government to punish, criminally, every wrong which is committed." (4 Pick. 178.)

In conclusion, then, will the court assume to create an offence, where none exists at common law, as practised in this state, or by statute? If it will not, then it cannot put the defendants on trial, and must quash this indictment. The court

cannot rightfully be governed by a supposed necessity of punishing unfaithful bank directors, no matter how the public may have suffered from bank failures. The whole question of the relative power of the courts and the legislature, in judging of the policy of creating and punishing offences, is so clearly expressed in a note in Christian's Blackstone, that I beg the attention of the court to it, as a full answer to any suggestion of public injury that may have been done by the official mismanagement of bank officers.

"The distinction between public crimes and private injuries, seems entirely to be created by positive laws. In positive laws, those acts are denominated injuries, for which the legislature has only provided retribution, or a compensation in damages; but when from experience it is discovered that this is not sufficient to restrain, within moderate bounds, certain classes of injuries, it then becomes necessary for the legislative power to raise them into crimes, and to endeavor to repress them by the terror of punishment, or the sword of the public magistrate." (4 Com. 5.)

Parker, for the commonwealth.

There are two questions before the court, to be decided before the cases go to a jury, namely :

1. Ought these indictments to be quashed, because no crime is therein set forth ?
2. Ought the indictments to be quashed, because the defendants are indicted jointly, not severally ?

The defendants have raised these preliminary inquiries. On these questions, I shall speak in their order, and maintain that the indictments ought not to be quashed, first, because an offence well known to the laws of the land is therein set forth ; secondly, because that offence is joint and several, and may be indicted either as joint or several.

1. The offence is technically called an official misdemeanor and criminal neglect of duty. It may be admitted that no pun-

ishment is expressly prescribed for such an offence in any statute, nor was it defined or declared to be any offence by an express statute of this commonwealth, made before these indictments were found. It nevertheless is well supported in law; and when our common law is fully codified, if ever that time arrives, it will find its place in the criminal code by express legislation.

Every one, doubtless, is aware that a large portion of our law, of that which is in daily use, is not yet written law; indeed, it may be asserted that much more than half the law which regulates civil actions and criminal proceedings, still has its foundation in that much derided, but absolutely necessary, unwritten, common law, which was brought by our forefathers from England. Not a promissory note, nor a shop-book-debt, nor a mechanic's account and charge for his labor or hire, nor a wood-sawyer's claim for sawing our wood, can be collected without resorting to the common law; no damages for a trespass on a man's person, his property, or reputation can be recovered without recourse to the common law. No crime, not murder, felony, or indeed any misdemeanor, can be punished without the aid of the common law. If we had nothing to rely upon but the statute law, as it now stands, the courts would soon come to a stop. There would soon be an end of all civil remedies, and all criminal trials. Thus necessary is yet our dependence on the common law, and by some who claim to be best acquainted with it, it is believed to be better than any statute law which our legislators can make. It is a party catchword to call it judge-made law; but whether judges made it or not, the legislature, in fact, *oblige* us to use it, because they provide in a very large class of cases *no other*. It is said to be the wisdom of ages, the result of the experience of several centuries, and has had the best labors of the best intellects to perfect it. It was brought here from the mother country, and used in the colony and province, so far as was suited to their condition, before the declaration of independence. When the constitution

Commonwealth v. Dunham and others.

was adopted, it was *retained* by these remarkable words in that admirable instrument, c. 6, s. 6, quoted by the learned counsel, Mr. Hallett, in his argument: "All the laws which have heretofore been adopted, used and approved in the province, colony, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until *altered or repealed* by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution." (Rev. St. 47.)

In the year 1807, the then chief justice of the commonwealth being Theophilus Parsons, and his associates being Samuel Sewall and George Thacher, in the case *Commonwealth v. Knowlton*, (2 Mass. R. 535,) the court say, "So much of the common law of England, as our ancestors brought with them, and of the statutes then in force, amending or altering it; such of the more recent statutes as have been since adopted in practice, and the ancient usages aforesaid, may be considered as forming the body of the common law of Massachusetts, which has submitted to some alterations by the acts of the provincial and state legislatures, and by the provisions of our constitution."

This declaration of the supreme judicial tribunal of the state, the proper official organ to declare it, has for thirty years been published in the face of the world, has been distributed by and among the legislators themselves, and never denied or impugned, and therefore is fully admitted, and its truth acknowledged and established. (See also 1 Mass. R. 61; and 1 Gallison's R. 494.) And in the year 1835, the Legislature (see Rev. St. 765,) reenacting a law of 1782, c. 9, s. 1, expressly provide, that "in any case of legal conviction, where no punishment is provided by statute, the court shall award such sentence, as is conformable to the common usage and practice in this state, according to the nature of the offence, and not repugnant to the constitution." The reference to common usage and practice, is a reference to the common law, for the supreme

court say, (1 Mass. R. 61,) "the usage of the country establishes and makes the common law." In 1837, the force of the common law, as to crimes, was expressly recognized by the legislature of this state. Some eminent jurists were appointed by a resolve of that body, and made a report, which was laid before the legislature, and on March 10, 1837, a resolve was passed, providing for a codification of "so much of the *common law* of Massachusetts, as relates to crimes and punishments, and the incidents thereof;" and five commissioners are now at work upon that interesting subject.

Thus true it is, that the common law is, in fact, in force, and part of the law of the land in Massachusetts. Indeed, in the words of an eloquent barrister, "when we go forth, it walks silent and unobtrusive by our side, covering us with its invisible shield from violence and wrong. Beneath our own roof, and by our own fireside, it makes our home our castle. All ages, sexes and conditions, share its protecting influence. It shadows with its wing the infant's cradle, and with its arm upholds the tottering steps of age." I will here add, that this common law, though often abused by those who understand it not, has received, and still receives, the panegyric of those best acquainted with it. In a recent work by Duponceau, that accomplished jurist of Philadelphia, he says: "I venerate the common law, not indeed the law of the Saxons, Danes and Normans, not that which prevailed in England, during the reign of the Plantagenets, the Tudors, or the Stuarts, but that which took its rise at the time of the great English revolution, in the middle of the seventeenth century, to which the second revolution in England gave shape and figure; which was greatly improved in England, in the reign of William and Anne, and the first two Georges, and which, during the last period, and since, has received the greatest improvement and perfection in this country, where it shines with greater lustre, than has ever illumined the island of Great Britain." I hope I shall be excused for thus establishing by proof, the force and prevalence of the common

law at the present day, because there are some who deny its validity, and many who reproach it as obsolete and anti-republican. I expect to establish these indictments upon seven propositions; and to begin at the foundation, the first one is:

1. The common law, in regard to crimes, so far as not altered by statutes or usages, is the law of the land in this commonwealth. The learned counsel of the defendants have not denied, and do not deny this proposition, but have assumed it as true, and argued upon it, and cited its decisions and rules, and I need trouble the court with no further attempt to establish it.

2. The second proposition is, if a person holds an office, the execution of which affects the public, and the law requires of that officer the performance of a specific act of duty, and he undertakes to perform it, if he be guilty of neglect or malfeasance therein, he is liable by the common law to be indicted, and, if found guilty, to be punished by fine and imprisonment. This principle of the common law will be found laid down in the English books, and it will appear by cases determined in New Hampshire, New York and Massachusetts, that it has not been altered by statute or usage in this country.

I proceed to give the references.

"An indictment lies at common law against all subordinate officers for neglect and misconduct, in the discharge of their official duties." (2 Chitty Crim. Law, 258, in note; 1 Russ. on Crimes, 218.) "Where an officer neglects a duty incumbent on him, either by common law or by statute, he is indictable for his offence, whether he be an officer of the common law, or appointed by act of parliament." (1 Russ. 213; 1 Hawkins P. C., book 1, c. 22, s. 5, and c. 25, s. 1.) If a public officer be guilty of neglect of duty, he is liable to be prosecuted by indictment. *Rex v. Pinney*, (5 Carr. & Payne, 258,); *Same case*, (3 Barn. & Adol. 956,); *Holland's case*, (1 Term. R. 692.) If persons were not compelled to act according to law, there would be an end of society. (Per. Littledale, J., in *Rex v. Pinney*, as above.)

Such is the general principle ; now for instances.

“ Indictment lies at common law for disobedience to, or neglect to obey, an order of the court of sessions.” (Per Lord Mansfield, in *Rex v. Robinson*, 2 Burr. R. 804 ; Cowp. R. 650 ; and by Dennison, J., in 2 Lord Kenyon’s R. 513.) The legislature have a sovereign mandatory power far above a court of sessions. “ Wherever a statute commands a matter of public convenience, an offender is punishable by way of indictment for his contempt of the statute.” (1 Russ. 61.) To disobey an order of the king in council, is an indictable offence at common law. *Rex v. Harris*, (4 Term R. 202.) This officer was a pilot. So to disobey the governor’s order, as set out in this indictment, must be as great an offence, connected with the mandate of the legislature. It is a constitutional, legislative command, entitled to obedience. To obstruct the execution of an act of parliament, is indictable. *Rex v. Smith*, (2 Doug. 441.) To neglect to obey this statute, is obstructing it, by officers who accepted an office on which the duty was imposed. Any obstruction of lawful process, whether it be by active means, or the omission of a legal duty, is an indictable offence. (2 Chitty’s Crim. Law, 144, in note.) The omission of the legal duty of examining the books of the bank, is an obstruction of a legal requirement. Neglect of a clerk of a court, in not estreating a recognizance, is an indictable offence, and the form of the indictment, in such a case, may be found in 1 Tremain’s P. C. 248. The omission to compare the cashier’s return and the books of the bank was a manifest neglect of duty. Omitting or neglecting to return certain votes given at an election for state officers, was held, by the governor and council, to be an indictable offence in the city officers of Boston, whose duty it was to return those votes. (See Report of Committee of Council of Massachusetts, August 31, 1838, upon memorial of B. F. Hallett, Esq. and others.¹) A man may be indicted for omitting or neglecting to aid and assist a peace officer, when in

¹ But see *Commonwealth v. Mayor and Aldermen*, ante, 298.

want of assistance. (See forms of Indictment, in 2 Chitty, 278.) A jailer or other officer, permitting a prisoner to escape, may be indicted for criminal neglect of duty. (See form in 2 Chitty, 171, &c.) In the charge delivered by your honor, at the opening of this court, to the grand jury, last term, it is laid down as law, that "it is well settled by high authority, that to do an act which is prohibited, or to omit the performance of one which is required to be done by a statute of the commonwealth, is a misdemeanor at common law." Neglect of duty by overseers of the poor, are indictable offences. *Martin's case*, (2 Camp. R. 269.) The indictment in this case, is fully set out in 3 Chitty, 704 to 711. *Comings's case*, (5 Mod. R. 179); 1 Bott's Poor Laws, 332; *Sainbury's case*, (4 T. R. 451); *Rex v. Barlow*, (Salk. 609.) Also reported in Carthew, 293, and in Skinner, 370, and 2 Nolan's Poor Laws; *Rex v. Davis*, (Sayer's R. 163.) Neglect of duty in coroners is indictable. (2 Chitty, 255); and also in note in that page: "neglect is indictable at common law, as well as other violations of magisterial duty." A sheriff for neglecting to execute a criminal — indictable. *Antrobus's case*, (6 Carr. & Payne, 784.) The officers of a friendly society for neglecting to obey an order to readmit a man they had expelled. (2 Smith's R. 56.) A friendly society is a private concern, and its officers are indictable for disobedience. Other cases, illustrative of the same principle may be found, of indictments for neglect of duty, in 6 Mod. R. 96; 3 Burr. R. 1317; *Bembridge's case*, (cited 6 East, 136); *Regina v. Wyat*, (1 Salk. 380); *Meredith's case*, (Russ. & Ry. 46, 47, in note); *Warren's case*, (ib. 48.) All public officers who have a trust are indictable in case of misfeasance. (8 Mod. 326; 2 Burr. R. 803, 804; 3 Burr. 1335, 1439; 4 Burr. 2106, 2494; 1 Vent. 49; 2 Ld. Raym. 1379.)

The foregoing are English decisions. I turn now to some American cases. *State v. Fletcher*, (5 N. Hamp. 257.) The language of the court in that case, fully sustains my position. It is very much to the point of this case. "Wilful neglect of duty was always an offence at common law." (Per Kent, J.,

2 Johns. Cas. 277.) The whole of Chancellor Kent's opinion there, in the note, demonstrates the law I contend for, and I beg the court to examine what that distinguished jurist there says. In our own state, the case of the *Commonwealth v. Harrington*, (3 Pick. R. 26,) shows that misdemeanors at common law continue to be misdemeanors in Massachusetts, and even though no precedent of such indictment be found in the English books. In *Republica v. Powell*, (1 Dall. R. 47,) a baker employed by the army of the United States, was deemed an officer of the public, *pro hac vice*, and indicted for falsely marking barrels of bread, as weighing eighty-eight pounds, when they weighed but sixty-eight pounds. The case from 2 Burrows, there cited, brings this case within Lord Mansfield's reasoning.

Assuming, then, that this principle of the law is well established, I shall now refer you to the enactments of the thirty-sixth chapter of the Revised Statutes of this commonwealth, and the act of incorporation of these two banks. From these statutes, and this portion of the common law, I deduce the following position, the third one, namely :

3. That a bank director is, in certain respects, and as alleged in the indictments, a public officer, and that by law, certain acts and duties are required to be performed by him as a public officer, by virtue of his office, and affecting the whole community, affecting the currency, affecting the operations of other banks, and the business more or less of all the citizens holding bank bills and dealing in bank stock, and especially affecting the legislature, in its calculations, inferences and operations ; thus extensively, in these particulars, affecting the public. Bank directors are, in fact, public officers, or *quasi* public officers, for the reasons following, among others :

1st. A portion of the sovereignty of the people is delegated to them for appropriate exercise, in two particulars, specially, namely : 1. To make money or its equivalent, they may issue bank notes, current as money, to more than their capital paid in. 2. Their bank notes are in fact bills of credit, or operate as

such, within the meaning of the constitution. They pass as money, and are a good tender, unless specifically objected to. They are currency used by the public as money.

2d. A large part of the stockholders' power is delegated to them for use and exercise, as follows: 1. Employment of the whole capital. 2. Issuing bank bills and post notes, which pass as money and currency. 3. Appointing power and supervisory power over cashier and other officers of the corporation. 4. They are certifying officers, expressly made so by statute. 5. The performance of special statute duties, are imposed on them by the legislature, and on *whose doings* and *certificates*, other banks, the legislature itself, and the public depend, for knowledge and data of action.

3d. Their office affects the whole public, as well as the whole number of stockholders, and all other banks. Every man, who has any money, is liable to have, and probably has, bank bills among his property, nay even in daily receipts and expenditures. Every man has an interest in knowing what bank bills are good and what are not. This depends upon the acts, the fair management, the doings, the duties well performed, the certificates, the liabilities, the responsibilities, even the moral character of the directors, under existing positive laws. The whole community, more or less, are affected by their doings or neglects. This general reasoning is supported by authorities.

What is an office? Take the answer from Cowell's Law Dictionary: "Office doth signify that function by virtue whereof a man hath some employment in the affairs of another, as of the king or of another person." See *Office*, in Williams's Law Dictionary; also 2 Black. Com. 36. Who are public officers? Take the answer from Carthew's R. 478; and 5 Mod. R. 431: "Every man is a public officer who hath any duty concerning the public."

By express statute, bank directors have most important duties concerning the public. They are certifying officers, considered by the law *fide digni*. "No other return shall be

required." They have a great trust committed to them, as to issuing bills and employing the whole capital of the bank. They appoint, control, and supervise the cashier, teller, and other officers. They have duties to perform to all the stockholders and to the public. The stockholders and the public may be benefited or greatly injured by their acts and neglects. Every one of their official acts more or less affects the public. Very important duties are assigned to them by public statutes, recognizing them as public officers, responsible to the community as such; and they are obliged to be sworn in the discharge of this special duty, and are "sworn officers." How much the public are affected by malfeasance in the office of directors, we have had sad experience. Some stockholders, some bill-holders have lost their all, or nearly all.

Their act of incorporation and the general bank law thus fully recognize directors of banks as public officers. Their duties are specially pointed out, their liabilities stated, their responsibilities manifestly shown, and they are required to do certain public official acts, and take certain official oaths, and execute certain public official trusts, affecting all classes of citizens, and concerning the public. A bank director is an *officer*. He has *official* duties to perform. Of course he has an *office*, and that *office* affects the *public* in many respects. He falls within the definition of a public officer. He has a trust, a public trust. A public officer is one authorized by law. He is chosen by law. Banks are required to have directors. A public officer is one whose election and appointment is *authorized by law*, by act of parliament or legislature. Some officers are appointed by one body, some by another. Judicial officers, by the governor; secretary and treasurer of the commonwealth, by the legislature; military officers, by election; police officers, by mayor and aldermen; pilots, by marine society; town officers by the inhabitants; clerks of courts, by judges; school committee, by ballot; constables, by selectmen, &c.; deputy-sheriffs, by the sheriffs, &c.

Bank directors are elected by stockholders, and must have certain qualifications by law. I think for these reasons the third position is maintained; a bank director is a public officer in many respects, and particularly, for the annual exhibit of the state of the bank, showing its liabilities and assets, its solvency, credit and management, and the value of its stock; they are certifying public officers, obliged to be sworn, to whose certificates and oath, public faith, the public confidence, is to be given, and on whose certificates alone, legislative action and private transactions, both are to be based. Even managers of a lottery were recognized as public officers in *Butler v. Kent*, (19 Johns. R. 228); and in *Schinotti v. Bumstead*, (6 Term R. 646.)

4th. The fourth proposition is, that by accepting the office of a bank director, and undertaking to act therein, a man is obliged to perform all the duties imposed on such officer by law, and engages to act faithfully, fairly, honestly, conscientiously, and vigilantly, in said office; and (it being a public office, as before proved,) he subjects himself to a prosecution by indictment, for neglect or malfeasance in said office.

No one can doubt this, where the office is a voluntary, not compulsory one; it seems to be a natural consequence or corollary of the preceding positions. The very words denoting an office, imply a duty to be performed. He who is elected to an office, is elected to perform a duty. He who accepts an office, pledges himself to perform its duties. An officer is responsible to somebody. An irresponsible officer is an anti-republican autocrat, unknown to our laws. Duty and responsibility are correlative. Bank officers are responsible to the stockholders, to the bill holders, to cashiers of other banks, to the legislature, to the public, who take bills or buy stocks. For criminal neglect, for positive misconduct in his office, he is liable to indictment, which is a prosecution by all the good people of the commonwealth in a mass; and the case cited by defendant's counsel, of *Butler v. Kent*, (19 Johns. R. 228,) proves, that for general neglect or misconduct, an individual in-

jured cannot sue him, without proving special specific injury to him individually, and Spencer, C. J., thought an indictment would be a proper remedy for such general malfeasance. No man can sue for a public nuisance, unless he, in particular, has received special, individual injury from it; the law, abhorring a multiplicity of actions, prescribes an indictment, which is a suit in the name of all the people, for a public nuisance. So, also, for a public officer's criminal neglect of duty, in a matter affecting the whole public.

It would seem improper, in the law, to give ten thousand individual suits at law, for one criminal false return. An indictment, therefore, is the proper mode of suit against a bank director, who, after voluntarily accepting his public office, is guilty of wilful neglect or misfeasance therein.

5th. The fifth position is, that every wilful misfeasance in a public officer, injurious to the public, every positive malfeasance, every wilful neglect or intentional omission of a positive, important duty, specially and peremptorily commanded by a statute, is an indictable misdemeanor at common law. The cases before cited prove this abundantly, and I need not repeat them.

6th. The sixth position is, that the wilfully signing a false certificate, as alleged in these indictments, that the books of a bank indicate the state of facts certified by the cashier, and swearing to the truth of that certificate, so much concerning and so injurious to the public, and its currency and transactions, without ever looking at the books, and without knowing they are certifying to and swearing to a truth or a falsehood, is a disobedience and violation of the positive requirements of the statute, and a voluntary dereliction of express duty, and is in a public officer, namely, in a bank director, a wilful misfeasance, a wilful neglect and intentional omission of duty, an official misdemeanor and criminal neglect of duty, and therefore indictable; especially if in fact the certificate be false.

Common sense and authorities unite in supporting this posi-

Commonwealth v. Dunham and others.

tion. I refer to the authorities. In the *Bishop of Chester's case*, (5 Mod. R. 434,) the fourth charge was "for certifying a falsity under his official seal, in a matter which nearly affected the government." In the case of the *King v. Mawbrey*, (6 Term R. 635,) the judges use very explicit language. Lord Kenyon: "I admit it is a voluntary act in the magistrates to certify; but if they undertake to make a certificate, they ought to know its contents are true." And in another place, he says, "I think they should have known the road was in repair, before they agreed to certify it was so. If at the time they did not know whether or not the road was in repair, and yet agreed to certify it was so, that is sufficient to constitute the delinquency of those defendants." Grose, J., says, "They are bound to know that the fact is true, which they agree to certify as such." Lawrence, J. "This is not unlike the case of perjury, when a man swears to a particular fact, not knowing whether it is true or false." (See Hawk. P. C. book 1, c. 69, s. 6.)

Therefore there are analogous cases, besides clear common sense, manifesting that such an act as is set out in this indictment clearly, is a breach of official duty, positively required by express mandate and orders of the legislature, and materially affecting the public.

7th. The punishment of such a misdemeanor is, by the common law, fine and imprisonment. (8 Co. 60, b; 2 Inst. 131; Bac. Abr. Fine, D; Com. Dig. Indictment, D; Rev. St. 765.)

Having now stated my own propositions, I shall briefly answer the opening arguments, or some of them, of the learned counsel of the defendants, Messrs. Cruft and Hallett, on the first question. I have leisure at this time only to give summary answers, as my duty now calls me into the supreme court, to continue the trials of the appeals there.

Mr. Cruft's first position is, that bank directors are not public officers. His quotations from 5 and 6 Mod. R. do not support his assertion, as they speak only of some public officers, and, in fact, bank directors are sworn officers for this duty.

The true criterion is, whether the office is an employment or duty concerning the public ; and under our statutes, bank directors are in fact public officers ; and though appointed by a special corporation, yet their duties concern the public, as the duties of pilots in Boston concern the public, and they are appointed by the marine society, a private corporation. The bank law is a public law, as the pilot law is a public law, as expressly decided by the supreme court in *Heridia v. Ayres*, (12 Pick. R. 334,) which case has much bearing on this case, and I beg your honor's careful consideration of it.

The case from 2 Bayley's South Carolina R. 220, that the legislature only can create a public office, has no bearing on this case, as the office of bank directors is in fact created by act of our legislature, and has its duties prescribed by public law.

Both the cases from Johnson, one relating to inspector of elections, the other to the manager of a lottery, support my views, when rightly understood. They are recognized as public officers. (2 Johns. Cas. 277 ; 19 Johns. R. 228.) Spencer, C. J., says, indictment might lie.

The argument from the constitution is of little weight. It speaks of "officers of government." There are other public officers besides political or governmental officers. Mr. Hallett's argument about the incompatibility of offices proves too much ; it proves that all town officers are not public officers. The plurality of officers mentioned, does not include town or city officers. The fallacy of the argument will be manifest by reading the constitution, which applies to some offices only.

As to banks being private corporations, I answer they are in the nature of public corporations, from the great interest the public have in them, and because, by a public law, certain public duties are imposed on its cashier and directors. The general bank law of Massachusetts makes their banks public corporations to a certain extent, and enough to make the officers public officers for certain purposes, and distinguish the banks in this state from those of all other states, and the cases cited from

Peters's, Wheaton's, McCord's and Hawks's Reports, do not apply to this case, on that account, but the case of *Heridia v. Ayres*, in 12 Pick. R. does.

What is said by both gentlemen, as to misdemeanor, is answered by the authorities I cited in support of my second proposition.

It is not pretended that this is an indictment for cheating an individual by false pretences. Signing and swearing to a false certificate, as alleged, is a fraud on the public, as selling goods by false weights and measures, and is indictable on account of its generality. And what is said about pecuniary specific penalties for misconduct, applies to particular acts of misconduct, different from what is charged in this indictment.

The argument that the law is *ex post facto* partakes of absurdity, as the law was made first in 1828, and reenacted in 1835, and the false certificate was made and sworn to in 1837; and the principle of the common law, that neglect of official duty is indictable, has prevailed for several centuries. There is no "stretch of power," as Mr. Hallett has stated, in the act of enforcing an old law upon a new neglect of duty. The statute imposing the duty may be new, but to disobey a statute is an old offence. The wrong complained of may be new in form, in species, but disobedience to a law is as old as Adam, and a kind of misdemeanor which ever has been punishable as an offence.

Equally absurd is the position that these directors have complied with the statute, and therefore have been guilty of no omission or criminal commission. Does the statute require a false certificate or a false oath? Does it command them to commit perjury, or swear to a statement which they do not know the truth or falsity of, and which turns out to be false? The legislature intended they should scrutinize the cashier's return, and examine the books, and certify the truth. The indictment says, they made no examination, and that is criminal omission and neglect, and they signed and swore to a false certificate, and that is crim-

inal commission and misdemeanor, and thus by the omission and commission together, the offence is complete.

The argument, that for making no return, the penalty is on the corporation, is no answer for making a false return by the directors. If such an argument would excuse the directors, it would excuse the cashier for perjury. There is a great distinction manifest in the statute, and the common law makes the officers punishable; and if only three, and not a majority of directors had signed, though it would be no compliance with the statute, yet the signing and swearing to a false certificate, under such circumstances, would be an indictable offence in those three.

But two arguments remain to be noticed. It is said that the new law now about to be passed, (Documents of the House, No. 56,) shows that the legislature never before intended to punish such an offence. This is a *non sequitur*, and would apply to all statutes made in affirmance of the common law. Lastly, Mr. Hallett said, that the 22d section of the bill of rights, and the 6th section of the 6th chapter of the constitution, show that this was a new offence, and could not be committed before 1828, and never was an offence until then, and that the common law could therefore not apply to it. I have answered this already, by showing that contempt or disobedience of a statute is an old common law misdemeanor, and though the statute may be new, the specific offence, the principle and definition of the crime, existed of old, and these general common law principles were adopted and used here before the constitution, and were continued by that instrument. Upon the second great question, I shall say but little, as it was not even argued either by Mr. Hallett or Mr. Cruft. The offence is joint and several. The act required was a joint act by "a majority of the directors." The certificate is a joint act, as a deed signed by ten men is their joint act and their several act. And this offence is not individual perjury, but a joint official act, required as such, done as such, delivered as such, and punishable as such.

Commonwealth v. Dunham and others.

THACHER, J. It appears from the record, that the defendants are jointly indicted for disobedience or neglect of a duty, which was required of them by law, in their capacity of directors of a bank. The rule is well established, that several may be jointly indicted and tried for offences arising wholly out of the same joint act or omission. (1 Stark. Cr. Pl. 33.) It is usual to include in one indictment several persons, charged with a criminal act, done at one and the same time, and in which they all took part. Although the act done is the separate act of each, and in that respect is several in its nature; yet the fault, if there is any, is common to all. One law required the act to be done by all these defendants; the same evidence would probably establish the fact against each; and the same general defence will apply to all, with perhaps some shade of difference,—as in the case of Mr. Page, one of the defendants, who, it is said, signed the false certificate, but did not make oath to it. Where several persons are concerned together in the perpetration of the same felony or misdemeanor, of whatever magnitude, they may be included in one and the same indictment, and may be put on trial together. While the accusation is pending, no one named in the indictment, unless after conviction and before sentence, or after a verdict of acquittal, is a lawful witness for his associates; as it might be a temptation to the commission of perjury. But it is not necessary, in a case like the present, that all concerned should be joined in the same indictment, and tried together. They may be indicted and tried separately; and it is always in the discretion of the court to order a separate trial, where it is shown to be necessary for the justice of the case, or to give the party accused a fair trial.

In the view which I have taken of this case, I do not think it necessary to occupy much time in considering a point, which had been much discussed in the argument, as to what constitutes a public officer. When the law requires an act to be done, it includes the power of performance, and makes it a

duty ; and where such duty is imposed on the officers of a corporation, as an official act, and for a public purpose, they are thereby constituted officers for that purpose, and wilful disobedience on their part would be a misdemeanor.

The only question which remains to be considered, therefore, is, whether the indictment against the defendants describes an offence known at law. For all the purposes of this argument, the facts set forth in the indictment must be deemed to be true.

It has been for some years the policy of the legislature of this commonwealth, to grant charters to banks, for the promotion of industry and manufactures, to stimulate enterprise, and to make the whole capital of the state active in developing its resources for wealth and improvement. So numerous have been the applications for banks, that, although burdened with a heavy tax, nearly a sufficient amount of revenue has been derived from this source alone, to defray the expenses of the government. Perhaps charters have been granted improvidently, without sufficiently consulting the wants of the community, or the ability of petitioners to advance the requisite capital. Many banks have been granted to borrowers, rather than to lenders, and the country has been filled with an unsound currency. For some time the idea prevailed, that the banks would best regulate themselves, and be a sufficient check on each other. But experience proved the danger to be apprehended from the mismanagement of banks, and from the lack of intelligence and fidelity in their officers ; and called for provisions to restrain excessive loans and discounts, and prevent them from issuing more bills than they could redeem in specie. With this view, an annual return was required to be made by the several banks, and the present indictment is founded on the 65th section of the 36th chapter of the Revised Statutes, which makes it the duty of the cashier of every bank, "upon the requisition of the governor, to make a return of the state of such bank, as it existed at two o'clock in the afternoon of the first Saturday in such preceding month as the governor may direct ; and he

Commonwealth v. Dunham and others.

shall transmit the same, as soon as may be, not exceeding fifteen days thereafter, to the secretary of the commonwealth ; which return shall specify the amount due from the bank, designating, in distinct columns, the several particulars included therein, and shall also specify the resources of the bank, designating, in distinct columns, the several particulars included therein, according to an appointed form. Which return shall be signed by the cashier of such bank, who shall make oath before some justice of the peace, to the truth of said return, according to his best knowledge and belief ; and a majority of the directors of each bank shall certify and make oath that the books of the bank indicate the state of facts so returned by the cashier, and that they have full confidence in the truth of said return ; and no further return shall be required from said banks."

The attorney for the commonwealth has contended in his argument, that the offence described in the indictment is an offence at common law, because it is an official misdemeanor and criminal neglect of duty. But it must be recollected, that banks were not known at the common law, nor were the cashier and directors of banks in this commonwealth ever required to make and certify on oath a return of the condition of their banks until the year 1828, when a law was made for that purpose. The indictment alleges, that the act complained of was done "contrary to the form and effect of the statute in such case made and provided," as well as "against the peace and dignity of the commonwealth." If the indictment can be sustained, either at common law or by the statute, the present motion must be denied.

It has been contended, that the offence described in the indictment was a misdemeanor at common law, because it was an act prohibited by the statute, but for which the legislature had declared no penalty. Nothing is better settled, than that wilfully to do an act which is prohibited, or to omit the performance of one which was required to be done by a statute, in

a matter which concerns the public, is punishable as a misdemeanor at common law, where no other penalty was enjoined. Before the statute required a return to be made upon the requisition of the governor, there was no obligation at the common law to make one. But when the statute required such return to be made, it became a duty, and wilful disobedience would constitute an offence.

The attorney for the commonwealth has very ably shown, both by argument and authority, that if the defendants *wilfully* signed and swore to the certificate in this case, it was a misdemeanor and an indictable offence at common law. The fifth position of his printed argument asserts, "that every *wilful* misfeasance in a public officer injurious to the public, every *wilful* neglect or *intentional* omission of a positive, important duty, specially and peremptorily commanded, is an indictable misdemeanor at common law."

The sixth position is, "that the *wilfully* signing a false certificate, as alleged in these indictments, that the books of a bank indicate the state of facts certified by the cashier, and swearing to the truth of that certificate, so much concerning and so injurious to the public, and its currency and transactions, without even looking at the books, and without knowing they are certifying to and swearing to a truth or a falsehood, is a disobedience and violation of the positive requirements of the statute, and a voluntary dereliction of express duty, and is in a public officer, namely, in a bank director, a *wilful misfeasance*, a *wilful* neglect and *intentional* omission of duty, and therefore indictable, if in fact the certificate be false."

The current of the authorities relied upon, in support of the prosecution, goes clearly to prove that if the misconduct or disobedience complained of in this indictment was done wilfully or corruptly, and with intent to injure and defraud, it is an indictable offence. The case of *Rex v. Martin*, (2 Camp. 268,) before Lord Ellenborough, was against an overseer of the poor for *fraudulently* omitting to give credit to the parish for a sum of

Commonwealth v. Dunham and others.

money which he had received from the putative father of a bastard child, as a composition with the parish for the maintenance of the child, and held good.

The case of *The People v. Denton*, (2 Johns. Cas. 275,) is much relied on for the opinion of Kent, J., which is found in a note. That was an indictment for a misdemeanor in neglecting his duty as an inspector of an election. It was founded on the election law of the state of New York, which declared "that if an inspector shall *wilfully* neglect to perform his duty, or be guilty of any corrupt misbehavior, and be thereof convicted, he shall forfeit and pay two hundred pounds." Kent says, in his opinion, "that *every wilful neglect* of a public trust, affecting the community, is an offence at common law."

The attorney, in his argument, has referred to the case of the *Commonwealth v. the Mayor and Aldermen of the City of Boston*, which was tried at the May term of this court, 1833.¹ They were indicted for neglecting to perform the duty of making out a true certificate of a result of an election which was held in this city, in April of that year, for a representative to congress for this district, for omitting, in the certificate which they transmitted to the secretary of the commonwealth, to mention the portion of votes which were given at the election for George Odiorne, Esq., who was one of the candidates. The indictment was founded on the act of 1833, c. 68, which declared, "that if the mayor, or either of the aldermen or ward officers of the city of Boston, shall *neglect* to perform any of the duties, which by that act they are required to perform, each officer so neglecting shall forfeit and pay a sum not exceeding two hundred dollars, nor less than thirty dollars. It was contended, at the trial, on the part of the defendants, by Mr. Pickering and Mr. Dunlap, their counsel, that unless the neglect was *wilful*, they could not be convicted. But the court instructed the jury, that they might find the defendants guilty, unless the defendants

¹ Ante, p. 298.

should satisfy them that the omission did not proceed from carelessness, which might have been prevented on their part by ordinary care. This opinion was founded on the express language of the act, which imposed the penalty for neglect, for a simple act of negligence. It was considered, that it was competent for the legislature to punish neglect in a matter of great political importance, even though it was not malicious or wilful. But in the 12th section of the 6th chapter of the Revised Statutes, this provision is altered, so that the forfeiture is now made to arise only in cases of *wilful neglect*.

The case of *Respublica v. Powell*, (1 Dall. 47,) was for a *cheat* at common law. The defendant was employed by the United States as a baker, and *fraudulently* marked two hundred and nineteen barrels of bread as weighing eighty-eight pounds each, whereas they only severally weighed sixty-eight pounds. Mr. Lewis contended for the defendant, that false tokens were only indictable by the statute of 33 Hen. VIII. c. 1, which was not in force in Pennsylvania. The attorney general, Sargeant, insisted that the defendant's office was in nature of a public trust, and that therefore the indictment was good. The court said, that this was clearly an injury to the public; and that the fraud was more easy to be perpetrated, since it was the custom to take the barrels of bread at the marked weight, without weighing them. The public could not by common prudence prevent the fraud, as the defendant was himself the officer of the public *pro hac vice*. They therefore decided that the offence was indictable.

The last case to which I shall refer, on which the attorney for the commonwealth relied, was of the *King v. Mawbrey*, (6 Term R. 619.) It was an indictment for a conspiracy to pervert the course of justice by producing in evidence a false certificate, that a highway (indicted) was in repair, to influence the judgment of the court. It was decided, that it was not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it was sufficient

that for such purpose they agreed to certify the fact as true, without knowing that it was so. In this case there was a wilful and fraudulent agreement by the defendants, to make a certificate to influence the court, without knowing at the time whether it was true. The court said, that they were bound to know that it was true before they signed the paper. Lawrence, justice, in pronouncing his opinion said, "it was not unlike the case of perjury, where a man swears to a particular fact without knowing at the time whether the fact was true or false; it is as much perjury as if he knew the fact to be false, and equally indictable."

An indictment must be a true description of an offence, and contain all circumstances which are essential to its commission. The omission of any material circumstance cannot be supplied by intendment, nor after verdict. Nothing is to be considered in the indictment which is not plainly expressed, or necessarily implied in the words. The rule applicable to all cases is, "that the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court that the indicters have not gone upon insufficient premises." Therefore it is said "that no periphrasis or circumlocution whatsoever will supply those words of art which the law hath appropriated for the description of the offence. But the indictment must expressly allege everything material in the description of the substance, nature, and manner of the crime; for no intendment shall be admitted to supply a defect of this kind."

I have endeavored to pay close attention to the printed argument of the learned attorney for the commonwealth, and to the authorities on which he has relied, in support of this indictment, and it appears to me that they are altogether founded on the principle, that the act of the defendants which is complained of, was done by them wilfully, if not corruptly. And yet I do not find in the indictment that what is charged against them is therein alleged to have been done wilfully, or with any unlawful intent. In drawing the indictment every allegation to that

effect is carefully omitted. And yet it is an elementary principle, that to render a party criminally responsible, a vicious will must concur with a wrongful act. (1 Stark. C. P. 177.)

This indictment does not charge against the defendants, that they certified and made oath to a return which they knew to be false, or had reason at the time to suspect was false. That would have been perjury, according to an express provision of the Revised Statutes. (c. 28, s. 2.) It is not charged in the indictment, that the defendants, intending to deceive and defraud the public, conspired together to make and publish this false certificate; or that they wilfully neglected to examine and compare the books with the return, knowing it to be false; nor is it intimated in the indictment, that they had any reason to believe that the books did not indicate the truth of the statement. But the indictment charges only, that the defendants did not examine the books, and did not ascertain the truth of the return, and that without any such examination, and without knowing the state of the books, they made and swore to the certificate, and that the return was false. It is not alleged, that this was done by them wilfully, and with an unlawful intent to deceive; and yet, to constitute a misdemeanor at common law growing out of the infraction of a statute, the indictment must, I conceive, allege that it was done wilfully and for some unlawful purpose. If the act of the defendants complained of might have been done innocently, by inadvertence, or through mistake, or even ignorantly, or from incapacity to understand the books, although the signing of such a certificate may have been an imprudent act, full of hazard to themselves and to the bank, and highly inconsistent with their duty as directors; it still cannot be a subject of criminal accusation at common law, which always includes something wilful, or corrupt, and done with an evil intent.

It is very apparent, that the statute intended that the return should be made from the books, and that the directors should give to it, by their certificate, the sanction of their personal

knowledge ; because they are required on their oath to certify that the books indicated its correctness. The statute, however, does not in express words require them "to examine the books, and to compare them with the return." It leaves to their discretion, to take their own method to satisfy themselves of the state of the books, and of the correctness of the return. If then, they should appoint one or more of their number, skilled in accounts, and in whom they reposed confidence, to compare the return with the books, and should make the certificate on the report of such committee, it could not be said, that they did the act without examination, and without knowledge ; and yet the return, even under these circumstances, might prove to be incorrect.

If the directors of a bank undertake to examine and compare the books with the cashier's statement, what degree of examination will satisfy the law ? One director will be satisfied with a slight inspection ; but a more careful and conscientious director will choose to go into a thorough examination, so as to be satisfied that the books of the bank are correct, as well as that they indicate the state of facts contained in the return. The law, presuming that directors will act in good faith, seems also to presume that they will perform this task according to their intelligence and sense of duty. It may be done very imperfectly. The return may be very erroneous, and mislead the public to their great injury. But, unless the fault arise from wilful misconduct on their part, I am constrained to believe, that it cannot be a subject of criminal accusation.

The bank may be made to suffer, according to the provision of the 66th section of the statute, for the neglect of its officers in not making a return. The directors may be subjected to answer for the damages, in their private capacities, for mismanagement and lack of vigilance ; because it is their duty to administer the bank according to the provisions of law, and to exercise a vigilant supervision over the cashier, and over all subordinate officers, which in some cases is both salutary and

necessary, and in all cases would be attended with good effect. But unless something is done by the directors unlawfully and wilfully, and with intent to defraud or to injure the public, or an individual, it is not matter for an indictment at the common law, or on the statute.

Both these banks have failed ; and I am aware that a great prejudice exists in the mind of the public against their managers. Without doubt there have been great imprudence and misconduct, and the public feel with deep sensibility the widespread ruin to individuals, and the discredit which has fallen on this community. But the defendants are not on trial for general mismanagement, or neglect in the performance of their trust, but for a specific act ; and the question is, whether the act charged is clearly defined to be an offence, and is within the meaning and intent of the law.

The law required them to certify on oath to the truth of the cashier's return. In compliance with the letter of the law, they have made and sworn to such a certificate, which proves to be false. If this was done by them wilfully, and they knew at the time, or had reason to suspect that it was false, the offence was perjury within the letter and spirit of the law, and nothing else. But the indictment makes no such charge, nor that the act was done with any criminal intent. In the entire absence of any charge of criminal intent, the court cannot infer one ; nor would a jury be bound to infer one, and the judgment would be arrested, if the jury should return a verdict of guilty. A trial would be a waste of time, and could be followed by no good consequences. It might even be a ground to reproach the inefficacy of legal forms. It follows, therefore, that as the indictment is defective in this essential particular, the defendants ought not to be held to answer further ;—and it is the order of the court, that both indictments be quashed, and the defendants be discharged.

Indictment quashed.

JUNE TERM, 1838.

COMMONWEALTH v. GEORGE C. WHITNEY.

Where, in the trial of an indictment for forgery, a paper was handed to a witness, with all the writing but the signature concealed, and the witness asked whether the signature was his; it was *held*, that the witness was not bound to answer, without first seeing the contents of the paper.

Where, in an indictment for forgery, it was alleged that the act was done with intent to defraud one D. F.; it was *held*, that the intent to defraud D. F. was material, and must be proved.

If a person passes a note as genuine, knowing it to be forged, the law infers that the intent was to defraud, because it is the natural consequence of the act.

If one signs the name of another to an instrument, with the honest belief that he had authority to do so, it negatives the intent to defraud.

THE defendant was tried on two indictments, for uttering two notes of hand, one for eight hundred dollars and the other for sixteen hundred dollars, purporting to be given by himself to George Whitney, with forged indorsements on the same, he knowing at the time that the same were forged, and with intent to defraud one Dana Fay. The signatures to the indorsements alleged to have been forged were those of George Whitney, the father, and David M. Whitney, a brother of the defendant. The indictments had been pending several terms, but the trials were delayed on account of the absence of George Whitney and David M. Whitney, who concealed themselves, that they might not be compelled to attend as witnesses for the prosecution. But they were brought into court, at the May term, and ordered to recognize in one thousand dollars each, with surety, for their appearance to testify at the trial. In the course of the cross-examination of George Whitney, the counsel for the defendant presented to him a paper, on which was written the name of the witness, and he was asked if it was his hand-

writing. The writing to which the signature was attached, was covered with an envelope, so that nothing appeared but the name. The witness requested to see the paper, as well as the signature; but the counsel refused, and said that his object was to test the ability of the witness to recognize his own handwriting. Both the attorney for the commonwealth and the witness appealed to the court. The counsel for the defendant said, that such a question, for like purpose, and in this form, had been allowed to be put to a witness in a trial in the supreme judicial court. The court ruled, that although the question might be put to the witness, and he might answer it, yet that the court would not compel him to answer, unless he were permitted first to see the instrument on which the signature was written. A view of the paper would assist both his memory and judgment. The question proposed to him in the present form, was calculated to create confusion in his mind; and a witness on the stand was entitled to the protection of the court, so as to give his testimony with full knowledge and deliberation. A person might be deceived by the imitation of his own handwriting, as well as in that of a stranger. It was well known, too, that signatures might be imitated so exactly, as to deceive the individual whose signature was forged. The witness declined answering without first seeing the paper.

Parker, for the commonwealth.

Sprague and *Brigham*, for the defendant.

THACHER, J. charged the jury as follows: — Forgery consists in falsely making a writing to the prejudice of another person's right, and with the intent to defraud. To utter such a paper, knowing it to be false, and with the intent to defraud another, is an offence of equal magnitude with the original forgery, and is punished with like severity. The present indictments are founded on the Revised Statutes, c. 127, s. 2, and are for uttering two forged indorsements on promissory notes, with intent in each case to defraud one Dana Fay. To support

Commonwealth v. Whitney.

these indictments it is necessary to be shown, that the defendant, having these notes in his possession, uttered them ; that is, passed them to Dana Fay, with the intent to defraud him. He might have been charged, generally, under the 14th section of the same chapter of the Revised Statutes "with an intent to defraud ;" in which case, if it should be shown at the trial, that he intended to defraud Dana Fay, or George Whitney, or David Whitney, or any other person, it would authorize your verdict against him. But the indictment alleges, which therefore is a material allegation, and must be proved, that the intent was to cheat or defraud Dana Fay ; and if you are not satisfied that he intended to defraud him, you must find the defendant not guilty. If the defendant knew that the indorsements were false, and that he had no authority to pledge the names of George Whitney and David M. Whitney for these notes, and yet deliberately passed them as genuine securities to Dana Fay, the law will infer the intent to defraud him ; because it naturally results from the act. For neither George nor David M. Whitney were answerable for the notes ; at least, the whole burden is thrown on the defendant to prove, that it was a *bona fide* act on his part, and that he did not intend to defraud. If I present and pass to the foreman a bill, with the name of one of my friends upon it, but know at the time that it is a forged signature, it would be idle to say, that I had no intent to defraud. I could not expect that such friend would pay it, after discovering the ill use which I had made of his friendship.

The question will then arise, and you must inquire, 1. whether the indorsements were forged ; and 2, whether the party on trial knew that they were forged. As to the first, not only do father and brother say that they never signed these indorsements, but no witness has been brought forward to testify, that he believed that the signatures were genuine. It is testified also, that the defendant admitted both to father and brother that they were false. But it has been contended, in the defence, that although the signatures to these indorsements were not genuine, yet that

the defendant was authorized to write and use the names both of George and David M. Whitney in this way, and that they were bound by his act. If it were true, that he had authority to use their names, it would follow, not only that they would be bound by the indorsements, and liable to pay the notes, but also that that the notes were not uttered with intent to defraud. If Dana Fay received a good indorsed note, he could not be defrauded by it, even although the parties should not be able to pay the money. If the father and brother had, in repeated instances, paid notes to which their signatures had been affixed by the defendant, without remonstrance or objection, it might be fairly inferred, that they had authorized him to use their names in this way.¹ But the father and brother not only deny the signatures, but that they ever gave to the defendant authority to use their names. They declare that they have never paid notes for him, to which he had forged their signatures. Formerly, they say, they indorsed his notes ; but for a year and more before this transaction, they had refused to lend him their names.

Now, it is for the defendant to prove, that they expressly or impliedly authorized him to use their names and credit in this way. To take it out of the case of a fraudulent uttering of these notes, it is not sufficient that he relied on their paternal and brotherly affection to pay the notes, and so to screen him from the legal consequences of his criminal conduct. If there was not an actual authority, still, if the defendant had fair ground to consider that he had such authority, that would negative the intention to defraud, and would relieve him from the imputation of guilt, which arises out of this transaction. As the defendant made the notes himself, he could not be ignorant that the signatures to the indorsements were false. And I think, unless you believe that he was authorized to use the names of father and brother, if not by an express, at least by a clearly implied authority, or unless he had fair ground to believe it, you will be bound to find him guilty.

¹ *Regina v. Parish*, (8 Car. & Payne, 94) ; *Regina v. Beard*, (Ibid. 143.)

Commonwealth v. Wallace.

The jury returned a verdict of guilty. The defendant appealed to the next term of the supreme judicial court.¹

MARCH TERM, 1839.

COMMONWEALTH v. JAMES WALLACE.

Where, in the trial of an indictment for illegal voting at a ward meeting in the city of Boston, a copy of the record of the proceedings of that meeting, kept by the clerk of the ward, was read, to show that such proceedings were illegal, and oral testimony was offered to prove the same, it was held, that such testimony was inadmissible, because the record was the best evidence of the fact.

Where one votes at an election, whose name is upon the list of voters, when he is not legally qualified to vote, it is a question of fact for the jury, whether he committed the offence wilfully.

THE defendant was indicted, under the Revised Statutes, c. 4, s. 6, for illegally voting at a meeting for the election of a member of the common council, for Ward No. 11, in the city of Boston, on the 24th day of December, 1838. The indictment charged that the act was wilfully committed by the defendant, he knowing, at the time, that he had not paid any tax within the commonwealth, at any time within two years preceding the election. It appeared that he had not paid any tax within two years. In addition to the circumstance, that his name, which was on the list of qualified voters, was checked, the officer who arrested him, testified, that he admitted to him in conversation, at the time of the arrest, that he voted at the election. But there was some uncertainty on the part of the witness, whether the admission referred to the meeting on the 24th day

¹ At the following term of the supreme judicial court in Suffolk, the defendant, having retracted his plea of not guilty on both indictments, was sentenced on each to a period of confinement in the state prison.

of December, or to a previous meeting; there having been two previous trials to elect a member of the common council for that ward without success.

The counsel for the defendant first insisted that the meeting was not duly organized, and read to that effect the proceedings of the meeting, copied from the record kept by the clerk of the ward, which he offered to prove by oral testimony. The county attorney objected to any testimony on this point, because it appeared that the proceedings of the meeting, at the organization of the ward, had been recognized as correct by the mayor and aldermen, which he considered as conclusive evidence of their regularity; and secondly, that oral testimony was not admissible to prove the contents of the clerk's record. The court ruled that it was competent to go into the inquiry, as to the legal organization of the meeting; inasmuch as if the meeting was not regularly held and conducted, the proceedings would be null and void, and therefore, no offence could have been committed by any one who presumed to vote on the occasion. But the oral testimony was rejected, because the record was the best evidence of the fact. The record was not produced, and the point was no further pressed.

Hallett, for the defendant, contended that the act was not wilful on the part of the defendant, inasmuch as his name was in the list of qualified voters; and he might, therefore, have reasonably believed that he had a right to vote at the election.

Parker, for the commonwealth.

THACHER, J., charged the jury substantially as follows:

It is not inappropriate to consider, at this time, what constitutes a qualified voter by the laws of the commonwealth, and some of the guards provided by law to secure the freedom of elections, and to maintain the pure elective franchise. Every male citizen of twenty-one years of age and upwards, (excepting paupers and persons under guardianship,) who shall have

Commonwealth v. Wallace.

resided in the commonwealth one year, and within the town in which he may claim a right to vote, six calendar months next preceding any election of town, county or state officers, or of representatives to congress, and who shall have paid by himself or his parent, master or guardian, any state or county tax, which shall, within two years preceding such election, have been assessed upon him, in any town of this commonwealth, and also every citizen who shall be by law exempted from taxation, and who shall be in all other respects qualified, as above-mentioned, shall have a right to vote in all such elections. (Cons. of Mass. 3d art. of amendment; Rev. St. c. 3, s. 1; ib. c. 6, s. 14.) He must be a citizen of the United States, and at least twenty-one years of age; have resided in the commonwealth for one year, and in the town for six months before the election; and have paid a state or county tax assessed upon him in a town of the state within two years.

To secure to voters their right, and to exclude from the ballot box those who are unqualified, it is made the duty of the selectmen in every town of the state, and of the mayor and aldermen in the several cities, to prepare lists of the qualified voters in their respective towns and cities; and no person is permitted to vote at an election, whose name is not borne on the list. To guard against omissions, which may occur through accident, mistake, or design, the list must be prepared and published in good season; at least ten days before each election, that the legal voters may know whether their names are on the list, and that any one who is wrongfully omitted, may cause it to be placed on the list. This is not considered as an additional qualification, superinduced upon the constitution, but as a reasonable and necessary means to secure to the legal voter his right, which is declared by that instrument, and to preserve in its original purity the elective franchise. On this point, the opinion of the supreme judicial court of this commonwealth was expressed, in the case of *Capen v. Foster*, (12 Pick. 485.) "The provision in the general law regulating elections," (says

Shaw, Ch. J.) "and that in the act incorporating the city, which require that the qualifications of voters shall be previously offered and proved, in order to entitle them to vote, that their names shall be entered upon an alphabetical register, or list of voters, is highly reasonable and useful, calculated to promote peace, order and celerity, in the conduct of elections, and as such to facilitate and secure this most precious right to those who are by the constitution entitled to enjoy it; that it cannot be justly regarded as adding a new qualification to those prescribed by the constitution, but as a reasonable and convenient regulation of the mode of exercising the right of voting, which it was competent to the legislature to make; and therefore, that these legal enactments, not being repugnant to the constitution, are valid and binding laws, to which both voters and presiding officers at elections, are authorized and bound to conform."

So early as March, 1801, an act was passed by the legislature, requiring lists of the qualified voters to be prepared in all the towns and districts, previously to the election of state officers, and declaring that no person should be permitted to give in his vote, until the presiding officers at the election had an opportunity to inquire his name, and had found it on the list. The experience of one generation having demonstrated the beneficial operation of this law, it was adopted into the Revised Statutes in 1835, and is now a part of our public law.¹

No person may vote at any election, who is not possessed of the legal qualification, even though his name should be borne on the list. The name on the list is a conclusive guide to the inspectors of the election; and they need not stop to inquire into the qualification or right of a person offering to vote, whose name is on the list; but the name being on the list confers no right on the individual to vote, if he does not possess the constitutional qualification. The constitution declares the qualification; the list is in aid of it, but does not supersede it. It may

¹ Act of 1800, c. 74; Rev. St. c. 3, s. 1.

Barnicoat and others v. Six quarter casks of Gunpowder.

not be known to those who prepare the list, that while an individual possesses the qualifications of age and residence, he is not a citizen of the United States, or that he has not paid a tax within two years. He may have removed from another town ; they may not have been correctly informed ; and in their desire to secure to the citizen his rights, they may have taken that for true, which ought to have been first proved. What, however, is doubtful and unknown to the public officer, is presumed to be matter of certainty to the individual. If he values a privilege which belongs to him, he can inspect the list, and see that his name is inserted on it. And, if he knows that he has lost his privilege, by failing to comply with the condition, he is bound to refrain from an act which the law condemns. In general, knowledge of qualification as well as of disqualification, is presumed to be possessed by the citizen who appears at the polls and tenders his vote. Still, however, there may be circumstances which will satisfy a jury that a party acted ignorantly, under belief of right, and without a wilful intention to offend. That is matter of fact for your consideration, and to be settled on your responsibility. Your verdict in this case will settle the question, whether you believe, from the evidence, that the defendant acted wilfully, even if no doubt should rest upon your minds, that he actually voted at the election.

The jury found the defendant not guilty.

JULY TERM, 1839.

WILLIAM BARNICOAT AND OTHERS, ENGINEERS OF THE CITY
OF BOSTON v. SIX QUARTER CASKS OF GUNPOWDER.

A plea of not guilty to a libel for the forfeiture of gunpowder, under the act of 1833, c. 151, by the claimant in whose possession the gunpowder was found, puts the truth of the libel at issue, both as to the liability of the gunpowder to forfeiture, and as to the guilt of the claimant.

Barnicoat and others v. Six quarter casks of Gunpowder.

Where issue was joined on a plea of not guilty to a libel for a forfeiture of gunpowder, under the act of 1833, c. 151, and the jury returned that the gunpowder was had, kept and possessed, in a building contrary to the statutes, and the rules and regulations of the engineers, and that the claimant was not guilty ; it was *held*, that the gunpowder was forfeited, and that the claimant was not liable for the costs of prosecution.

THE libel in this case, setting forth the grounds of seizure, was filed in the clerk's office, on the 20th day of May ; and, at the June term, Tasker H. Swett appeared by counsel, and had leave till the 25th day of that month to file a claim and answer. Upon the claim and answer so filed, the counsel for the libellants moved for a decree, on the ground that nothing was contained in the answer, controverting the right to seize the gunpowder, or showing that it ought not to be forfeited. The counsel were heard on this motion, and the court, after consideration, pronounced the following opinion :

Parker, for the libellants.

Fletcher, for the claimant.

THACHER, J. By the fifth section of the act of 1833, c. 151, entitled "an act further regulating the storage, safe keeping, and transporting of gunpowder, in the city of Boston," it is enacted that all gunpowder which shall be kept, had or possessed within the city of Boston, contrary to the provisions of that act, and to the rules and regulations made by the board of engineers of the city of Boston, may be seized and taken into custody ; that the same shall be libeled within twenty days afterwards ; and that a summons shall be served on the person, in whose custody the gunpowder shall have been seized, to appear and show cause, why the gunpowder so seized should not be adjudged forfeit. It is also enacted, that if the same should be adjudged forfeit, such person shall pay all costs of prosecution. From the language of the act, it seems not to be material, whether the person who was possessed of the gunpowder, was the owner or not. If, being in his possession at the time,

Barnicoat and others v. Six quarter casks of Gunpowder.

it is liable to be forfeited, and if it shall be so adjudged, he shall pay all the costs of prosecution.

The libel in this case, after setting forth at length the several acts of the legislature, and the regulations adopted by the board of engineers on the subject of gunpowder, complains, that on the first day of May, 1839, Tasker H. Swett was duly licensed to keep and sell gunpowder at his place of business, in this city, No. 18, Custom House street, and that, on the 20th day of the same month, he had, at that place, six quarter casks of gunpowder, over and above, and more than he was by his license authorized to keep there; and that, for this cause, the engineers entered and seized the same. In the claim and answer of the claimant, he says, that he was not the owner of the gunpowder, but that it belonged to the King's Mills Powder Company, of the town of Exeter, in the state of New Hampshire, and he claims the same for that company, as their authorized agent. For answer to the libel, he says that he is not guilty in manner and form as the libellants have declared against him, which he is ready to verify, &c. He concludes with a prayer, that the gunpowder may be restored to him, as the authorized agent of the said owners. The counsel for the libellants insists, that this plea does not answer the whole libel, and moves, that for want of an answer to that part which relates to the seizure of the six quarter casks, the same should be decreed forfeit. He contends, that the plea puts in issue only the guilt of Swett, and his liability to pay the costs. The claimant may not be answerable for the costs, he says; but still, the gunpowder may be liable to be decreed forfeit. The counsel for the claimant contends, that the plea of not guilty denies all the allegations of the libel, and tenders an issue, which is sufficient in law, to throw upon the libellants the burden of proving the whole case, both the right of seizure, and the guilt of Swett.

Generally, the plea of not guilty is a denial of every material fact and allegation on which judgment is claimed against the defendant, whether to an indictment or civil action, in the admi-

rality or exchequer. On this point, I need not multiply authorities, as it accords with reason and good sense, which are always to be respected ; and is settled conclusively by the Revised Statutes, c. 100, s. 27, which declares, that "in every suit or action, brought to recover any forfeiture, the defendant may plead the general issue, and give in evidence any special matter, which might have been pleaded in bar of the suit."

The article seized may be liable to seizure and condemnation, and yet the party in possession be not liable to costs ; for it may have been in his possession, without his knowledge and consent, or in direct opposition to his will. But the facts of this case remain to be settled hereafter. It appears from the libel, that the claimant was duly licensed to sell gunpowder by wholesale and retail ; and it is apparent therefore, that he had a right to have the article in his possession, according to the regulations of the board of engineers. If he has exceeded his license, the excess may be liable to forfeiture. He may contend, however, that these six quarter casks were within his license. But the libellants must show, as they have alleged, that they were "over and above, and more" than his license authorized ; otherwise, there must be a verdict of acquittal and a restitution of the property. From the language of the act, it is clear, that if the gunpowder was found in the possession of the claimant, he is the proper person to be summoned, whether he was the owner or an agent for them. If it was in his possession, with knowledge and consent, contrary to the acts of the legislature, and the regulations of the engineers, there must be a general verdict of guilty, notwithstanding he acted only as an agent. For his agency will not screen him from the consequences of an unlawful act. Under a general verdict of guilty, the gunpowder would be adjudged forfeit, and the claimant would be made to pay the costs of prosecution.

If, however, the court should now decree, that the gunpowder should be forfeited and sold, and hereafter there should be a general verdict of acquittal, it would then appear by the record,

Barnicoat and others v. Six quarter casks of Gunpowder.

that the claimant did not have at his place of business these six quarter casks over and above the privilege of his license, and further, that the gunpowder had not been kept contrary to the statutes and regulations. Consequently, a decree of forfeiture at this time might be both premature and erroneous. If the verdict should acquit the claimant of any liability, because the gunpowder was not in his custody and possession, with his knowledge and consent, still it will be competent for the jury to find also, that it was kept contrary to law, if the evidence will authorize it. The plea tendered puts the truth of the libel in issue, both as to the liability of the six quarter casks of gunpowder to forfeiture, and as to the guilt of the claimant; and therefore, the motion for a present decree, as to the gunpowder, is denied.

Motion denied.

The case was tried by the jury, on the 16th day of July, and resulted in the following verdict: "That the six quarter casks of gunpowder were had, kept and possessed, in the city of Boston, in a building contrary to the statutes, and the rules and regulations of the engineers; and the jury further say, that the said Swett is not guilty in manner and form, as set forth in said libel." Thereupon, the counsel for the libellants moved, that after proclamation made, the gunpowder should be decreed forfeit, and be ordered to be sold; and further, that the said Swett be ordered to pay the costs of prosecution, notwithstanding the verdict. The counsel for the claimant then claimed to be heard against the motion; and accordingly, the parties were heard on a subsequent day, namely, on Saturday, the 27th day of July; and, on Monday, the 29th, the court gave the following opinion, in which is contained a condensed view of the proceedings.

THACHER, J. In all cases of seizure of property, for an alleged forfeiture, the owner may put in his claim to the property, and contest the forfeiture. Where, consequent on the

Barnicoat and others v. Six quarter casks of Gunpowder.

seizure, the party from whom the property is taken, is subjected to pay the costs of prosecution, it is in nature of an additional forfeiture, whereby his property is liable to be taken in execution, and for want thereof, his body to be arrested and held for the payment. In this case, the six quarter casks were seized in the store of Tasker H. Swett, and a notice was served on him according to the statute. The libel charges, that Swett was a duly licensed dealer in the article of gunpowder, by wholesale and retail, at a certain place in this city; that he had these six quarter casks in the same place, contrary to the provisions of law, and the regulations of the board of engineers; and that the same "were over and above and more" than he was authorized to keep there, and that they were for this cause seized. Swett appeared and claimed the property, as belonging to the King's Mills Powder Company, of the town of Exeter, in the state of New Hampshire; and for answer to the libel, said, that he was not guilty in manner and form as the libellants had alleged, and further, that he was ready to verify the same. He then claimed restitution of the property, as a general agent of the company.

In this stage of the proceedings, the attorney for the libellants moved, that the gunpowder should be decreed forfeit, inasmuch as the plea of the claimant did not deny its liability to seizure. But this was opposed by the attorney of the claimant, on the ground, that the general plea of not guilty was a denial of the truth of all the allegations in the libel, and upon an issue to the jury framed on that plea, the whole case would be open to them. And this was the opinion of the court at the time, and the motion was denied. The issue tendered was then joined by the parties. At the trial, on the 16th day of July, *John Dunn*, was called as a witness for the libellants, and testified, that he took the six quarter casks into the store, not seeing their contents, and not knowing that they contained gunpowder. The casks were brought to the store, early in the morning of the 20th day of May. They belonged to other per-

Barnicoat and others v. Six quarter casks of Gunpowder.

sons in the city, but were not carried to their stores in the carriages which brought them into the city, owing to the street being blockaded at the time, and he, the witness, personally undertook to deliver them, without any authority from the claimant, who was not in the store at the time, and knew nothing of the transaction. Witness was a porter in the store. He said it was the express orders of Swett to his people never to take into the store more gunpowder than could be contained in the chest, according to the regulations of the engineers. It was also in testimony, that it was not usual, nor, in any instance, had it happened before that time, that gunpowder had been left at the store, in that way, to be delivered from thence to the owners.

The court instructed the jury, that if they believed from the evidence, that the gunpowder was had and kept in a situation contrary to law and the regulations, they must so find that fact; and if they believed further from the evidence, that the gunpowder was carried to the store without the claimant's knowledge and consent, and against his general orders, they must find him not guilty; or that they might return a general verdict of conviction or acquittal, according to the evidence. They returned a verdict against the powder, and found the claimant not guilty. Now it is moved by the attorney for the libellants, that the gunpowder be decreed forfeit; and that it be further ordered, that the claimant be required to pay the costs of prosecution, notwithstanding the verdict. It is contended, that the issue joined by the parties was immaterial. The letter of the law throws upon the claimant the costs of prosecution; because the gunpowder was found in his place of business; and he must be left to settle the matter with Dunn, the porter, who had disobeyed his orders.

Inasmuch as the alleged ground of forfeiture in the libel, is the personal fault of the claimant, I cannot doubt his right to deny this allegation by a general plea of not guilty, which is the *litis contestatio* of the civil law, and a general denial of the charge.

Barnicoat and others v. Six quarter casks of Gunpowder.

If the gunpowder was not liable to seizure, he, of course, would be acquitted. Therefore it is, that under this issue, the libellants must prove that the gunpowder was kept contrary to law. But the gunpowder may have been liable to seizure, and yet the claimant be free from fault. Suppose that the gunpowder was not found in his store, or suppose it was put there covertly, without his knowledge, or against his will, or to injure his reputation, it would be inequitable, I think, to subject him to the costs of prosecution. He who has the legal custody of a thing, is supposed to have it in his legal keeping with knowledge, and to be answerable for it in case of loss.

The jury have found that the gunpowder was kept contrary to law, but that the claimant was not guilty. It follows then, that he is not liable to the costs of prosecution, notwithstanding that the gunpowder must be decreed forfeit. While that verdict is in force, the court cannot adjudge him to pay the costs of court. For that would be, in effect, to deprive him of the benefit of the trial by jury; and to condemn him as guilty, when the verdict of the jury has pronounced him innocent.

The gunpowder was, after proclamation, decreed to be forfeited and sold, and the proceeds paid to the engineers. The motion to adjudge Swett to pay the costs of prosecution was denied. And a further motion by Swett, that he should be allowed costs against the libellants, was also denied, it being considered by the court, that there was no reasonable cause why the gunpowder should not have been seized.¹

¹ A bill of exceptions was filed to the judgment of the court, denying his motion for costs against the claimant, and for other opinions expressed in the course of the trial, which was allowed and signed on the last day of the term. The bill of exceptions was argued at the March term of the supreme judicial court, in Suffolk, in 1840, and the judgment of the municipal court was confirmed. See *Barnicoat v. Gunpowder*, (1 Met. 225.)

APRIL TERM, 1840.

COMMONWEALTH v. PHINEAS J. STONE.

Where a party, at whose request a deposition *in perpetuum* was taken, omitted, in his application, to state that he was desirous to perpetuate the testimony of the witness, as prescribed by the Revised Statutes, c. 94, s. 34, but no objection was made for that reason, at the time of taking the deposition, and the notice of the magistrates to the deponent, and their certificate, showed that the deposition was taken *in perpetuum*; it was *held*, that such deposition was not, for that cause, inadmissible.

An unrecorded deposition *in perpetuum* is admissible to support an indictment for perjury against the deponent, at any time within the ninety days prescribed by the Revised Statutes, c. 94, s. 37, for recording such depositions, but not after that time has elapsed.

Where an indictment for perjury against a deponent, committed in giving a deposition taken *in perpetuum*, concluded with the following words: "as by his said answers to said interrogatories written in said deposition remaining, will, among other things, appear;" it was *held*, that, upon the rejection of the deposition, parol evidence was inadmissible to prove the testimony of the deponent.

THIS was an indictment for perjury, founded on the Revised Statutes, c. 128, s. 2. The words of the statute are as follows: "If any person, of whom an oath shall be required by law, shall wilfully swear falsely, in regard to any matter or thing, respecting which such oath is required, such person shall be deemed guilty of perjury." The indictment set forth the alleged perjury in ample form, and charged it to have been committed by the defendant, in answers to certain interrogatories, contained in a deposition which was taken in perpetual remembrance of certain matters or things, before Joseph Willard and Aurelius D. Parker, esquires, justices of the peace, and counsellors at law, on the 9th day of February, 1839, pursuant to the Revised Statutes, c. 94, s. 34. After the jury were empaneled, the county attorney, before calling any witnesses, offered in evidence and in support of the prosecution, the de-

fendant's deposition, which contained the alleged perjury, and the proof that it had been taken pursuant to the statute.

Choate and *A. Cushing* for the defendant, objected to the reading of this deposition, because it had not been recorded within ninety days after the taking thereof, as directed in the Revised Statutes, c. 94, s. 37. They argued that it could not be given in evidence for any purpose, either in the trial of a civil action between persons interested, or in support of a criminal accusation against the deponent for any matter contained in the deposition.

Parker, for the commonwealth, admitted that it could not be read in evidence in the trial of a civil action; but he insisted, that, inasmuch as the alleged perjury was committed at the time the deposition was given, whether it was recorded or not, was not material. The perjury was a matter independent of the recording of the deposition, and done before it was required that the deposition should be put on record. If it was ever committed, the failure to record the deposition could not purge the criminal act. If it was good for no other purpose, it ought to avail against the deponent for the wilful perjury.

THACHER, J. The deposition is offered as one taken *in perpetuam*, and as containing the evidence, that all forms required by law had been observed to render it valid. Annexed to it is, 1. The written application to the magistrates for taking the deposition, in which William Jones, the applicant, sets forth his title and interest in the subject, for which he wishes to perpetuate the testimony, and the names of the deponent, and of all persons interested. 2. It contains the original notice which was issued by the magistrates, and the service of the same. 3. To the deposition is added the certificate of the magistrates of the time and manner of taking it, and that it was taken in perpetual remembrance of the thing, the name of the person for whom it was taken, and of all persons who were notified, and also of all who attended at the time. It also sets forth the tenor of

the oath which was administered to the deponent. The paper is the highest and best evidence of all these facts. If the deposition was not taken according to the forms of law, it never could have had a legal existence. An objection was also made to the deposition, for the insufficiency of the application to the magistrates, in not expressing that it might be taken to perpetuate the remembrance of the thing. But the notice from the magistrates to the persons interested, and the certificates, show that the deposition was taken *in perpetuum*, and that it was the request of Jones, that it should be so taken. The deponent did not refuse to testify, nor did the parties in interest object for this cause. As they waived this objection, and as the notice and certificate are in ample form, I should not reject the deposition for this cause.

Possessing all intrinsic evidence, that the deponent appeared, and gave his deposition according to law, if it had been offered in evidence before ninety days had elapsed from the taking, it could not have been rejected on the ground that it had not been recorded; because the time had not arrived for the ceremony of recording, and the law would presume, that it would be recorded within the proper time. It is not like a deed of land, which cannot be used in evidence of the title of the grantee, or of any one claiming under him, until it has been put on record. (Rev. St. c. 59, s. 1.) The 37th section of the 94th chapter of the Revised Statutes, requires, that "the deposition with the certificate, and also the written statement of the party, at whose request it was taken, shall, within ninety days after the taking thereof, be recorded in the registry of deeds, in the county where the land lies, if the deposition relates to real estate; otherwise, in the county where the parties or some of them reside." The oral testimony of a witness in court, in presence of both parties, is the best evidence, at the common law, in all cases where it can be obtained. But, from the necessity of the case, the rule has been relaxed, where the deponent cannot attend personally; and his deposition may be used, when

taken under the observance of such forms as the statute requires. But where these forms have not been literally observed, the deposition cannot be used. Therefore it is, that it has been settled, that a deposition *in perpetuum* is not admissible in evidence, after the expiration of three months, unless it shall have been recorded within that time.

The act of 1797, c. 35, enacts respecting a deposition taken *in perpetuum*, "that the same deposition and caption shall, within ninety days, be recorded in the office of the register of deeds in the county where the land lies, if the deposition respected real estates; and if the same respected personal estates, then in the said office of the county where the person lives for whose use such deposition was taken; and such certificate shall be certified on the deposition, and the same deposition so certified, or a copy of the said record, may, in the case of the death of such deponent, or absence out of the state, or inability to attend the court as aforesaid, be used as evidence in any cause to which it may relate." In the case of *Bradstreet v. Baldwin*, (11 Mass. R. 229,) a deposition which had been taken *in perpetuum* had been used at the trial, although it was objected by the defendant, that it had not been recorded within ninety days, and although it was recorded a few days after. The supreme judicial court say, "that the statute respecting depositions taken *in perpetuum* was not punctually observed; and the deposition admitted at the trial not having been recorded within the time prescribed, was not in that authentic form which the statute requires," and therefore, they ordered the verdict to be set aside, and granted a new trial. And in the case of *Braintree v. Hingham*, (1 Pick. R. 245,) the supreme judicial court say, "that a deposition *in perpetuum* was properly rejected, because it had not been recorded according to the statute."

Why does the statute require that a deposition *in perpetuum*, should be recorded? It is to preserve its purity and integrity, as well as the testimony itself. The record is a publication,

Commonwealth v. Stone.

and serves to make it known, as well as remembered. If it should contain errors or falsehoods, the parties in interest will have an opportunity to guard against them in season, either by taking the deposition *de novo*, or by putting on record the testimony of others, to contradict or explain its contents. If this deposition had been recorded in due season, the record would have been open to the deponent as well as to others. If he had found, that through inadvertence, he had testified what was false or incorrect, it would, or at least, it might, have been in his power to correct his testimony, and to show that it was not a wilful perjury. But as this deposition was not recorded, it has become a dead letter, and no legal consequences can flow from it. It can now do neither good nor harm to the parties in interest. And as he for whose use it was taken, and who was most interested in the thing, has failed to cause its existence to be perpetuated, I am of opinion, that it ought not now to be used to prove that it was originally taken according to the form of law, or the error or fault of the witness ; and it is therefore rejected.

Aurelius D. Parker, Esq. was then called and sworn. He testified that he was a justice of the peace and a counsellor at law ; and that he was engaged with Joseph Willard, Esq. in taking the deposition of the defendant *in perpetuum* ; but that Mr. Willard reduced it to writing. The witness was present during part of the time, and the oath was administered in his presence. He could not identify the person of the defendant.

Joseph Willard, Esq. was sworn as a witness, and was asked by the county attorney, what answers were given by the defendant to certain questions put to him at the time, that he gave the deposition. But the counsel for the defendant were permitted to ask the witness, before he replied to the question, whether the answers of the defendant were reduced to writing, and signed and sworn to by him at the time. The witness said

that they were reduced to writing, and subscribed and sworn to by the defendant at that time. They then objected, that oral evidence of the contents of the deposition was inadmissible, while the writing was in existence.

THACHER, J. The indictment, after setting forth the interrogatories and answers, and all the forms observed in taking the deposition, on which the accusation rests, concludes as follows, namely : "as by his said answers to said interrogatories written in said deposition remaining will, amongst other things, appear." Now, this requires the production of the record of the deposition ; but as none such remains of record which can be read in evidence, the commonwealth cannot be permitted to supply the deficiency by parol or unwritten testimony.

Thereupon the county attorney gave up the prosecution, and offered to enter a *nolle prosequi* ; but the defendant claimed his right to a verdict, and the jury returned one of not guilty.

OCTOBER TERM, 1840.

COMMONWEALTH v. JOHN HUNT, PATRICK HAYES, DANIEL O'NEAL, SUPPLIER WOODS, MICHAEL O'CONNER, EDWARD FARRINGTON, JOHN ODIORNE, AND OTHERS UNKNOWN.

A combination among journeymen bootmakers, to compel, by force of numbers and discipline, and by imposition of fines and penalties, other journeymen to join their society, and masters to employ none but members, is an unlawful conspiracy at common law, in Massachusetts.

The gist of the offence of conspiracy consists in a confederacy to do an unlawful act, and the offence is complete when the confederacy is made. It is not necessary to complete the offence that the confederacy should be to commit an act which is indictable.

Where, in the trial of certain journeymen bootmakers, for a conspiracy to prevent master bootmakers from employing any journeyman who was not

Commonwealth v. Hunt and others.

a member of a journeymen bootmakers' society, to which the defendants belonged, the counsel for the defence inquired of a witness the price of flour at the formation of the society, to show that the object of the defendants in forming their society, was to raise the price of wages in proportion to the price of flour and other necessities; it was *held*, that such testimony was inadmissible.

THE indictment against the defendants contained five counts, the substance of which was, that the defendants, "being workmen in the art, mystery and manual occupation of bootmakers, unlawfully, perniciously, and deceitfully, designing and intending to continue, keep up, form and unite themselves into, an unlawful club, society and combination, and make unlawful by-laws, rules and orders among themselves, and thereby govern themselves and other workmen in the said art; and unlawfully and unjustly to extort great sums of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did then and there unjustly and corruptly conspire, combine, confederate, and agree together, that none of them should thereafter, and that none of them would, work for any master or person whatsoever, in the said art, mystery, or occupation, who should employ any workmen or journeymen, or other person in the said art, who was not a member of said club, society, or combination, after notice given him to discharge such workman, from the employ of such master." The indictment further charged, that the defendants compelled Isaac B. Waitt to dismiss from his employment Jeremiah Horne, and that they conspired to impoverish Jeremiah Horne, Isaac B. Waitt, Davis Howard, Elias P. Blanchard, and others.

The constitution of the society, which was read in evidence, among other articles, contained the following :

"Whereas, we, the journeymen bootmakers of Boston, believing it to be a duty incumbent on us to adopt some measures in connection with our brother craftsmen of other cities and towns, in order to maintain that rate of wages which is necessary to insure us the necessities of life, and believing too, that concen-

tration of feeling and action is indispensable in effecting our wishes, do adopt the following constitution, pledging ourselves to be governed by and to support it in all its bearings; provided always, in so doing, we do not act in opposition to the laws of this commonwealth.

Art. 8, sec. 1. The duty of the standing committee shall be to assist the president in keeping order, and to expel any disorderly person, when ordered by the president. They shall provide a place to hold meetings, and attend to the general welfare of the society.

Sec. 3. They shall notify all journeymen workmen in the city, not belonging to the society, and invite them to join the same, and for neglect of duty pay a fine of fifty cents.

Art. 12, s. 1. None shall be admitted into this society but those of approved moral character; and each member, on his admission, shall subscribe his name to the constitution, and pay the sum of fifty cents as his initiation fee; *provided*, this society may, by a vote of two thirds of the members present, at any legal meeting, admit the members of any regularly organized society, free from initiation fees on their presenting a "card."

Sec. 2. The funds of this society may be appropriated to assist any journeyman belonging to the same, who may be ten days on a "strike"; said assistance to be demanded at the time of the "strike," and also to assist any member that may be in distress; *provided*, two thirds of the members, at any stated or special meeting, vote to do so.

Art. 13, s. 1. Any journeyman working in this city, who does not belong to this society, after being notified of the next society meeting, and not joining at the next meeting, or the one following, shall pay a fine of two dollars.

Art. 14. Any member working for a society shop, and knowing a journeyman to be at work for the same, who is not a member of this society, shall immediately give notice to the other journeymen, who, on receiving such information, shall quit

work for that shop ; *provided*, said shop shall have a majority of society men on work, but if their number be less, they may continue until work can be obtained elsewhere."

Parker, opened for the commonwealth substantially as follows:

That part of the common law of England, which was brought here by the first settlers, and practised upon before the revolution, is continued by the constitution to be law, until altered or repealed by the legislature. Our courts and public statutes have recognized such parts of the common law as part of the law of this commonwealth. The crime of conspiracy, though not especially made punishable by any statute here, is recognized as a crime in the Revised Statutes, c. 82, s. 28, and c. 86, s. 10, and there is no statute repealing or altering the common law against conspiracies. At common law the crime of conspiracy is defined in 2 Hawk. P. C. c. 72, s. 2 : " A confederacy wrongfully to prejudice a third person ; as where divers persons confederate together, by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter, whether true or false." See also 2 East, P. C. 823.

Parsons, C. J., in *Commonwealth v. Judd*, (2 Mass. R. 337,) says, " This rule of the common law is to prevent unlawful combinations. A solitary offender may be easily detected and punished. But combinations against law are always dangerous to the public peace, and to private security. To guard against the union of numbers to effect an unlawful design is not easy, and to detect and punish them is often difficult. The unlawful confederacy is therefore punished to prevent the doing of any act in execution of it. Of this principle the adjudged cases leave no doubt." The gist of conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act with an unlawful purpose. The offence is complete when the confederacy is made, and any act done in pursuance of it is no constituent part of the offence, but merely an aggravation of it. *Rex v. Edwards*, (8 Mod. 320) ; *Rex v. Journeymen Tailors*, (8 Mod. 11) ;

Rex v. Robinson, (1 Leach C. C. 47); *Commonwealth v. Tibbetts*, (2 Mass. 537); *Commonwealth v. Warren*, (6 Mass. 74); *People v. Mather*, (4 Wend. 259); *State v. Cawood*, (2 Stew. 360); *State v. Rickey*, (4 Halst. 293); *State v. Buchanan*, (5 Har. & J. 317); *Collins v. Commonwealth*, (3 S. & R. 220); *Respublica v. Ross*, (2 Yates, 8); *Commonwealth v. Davis*, (9 Mass. 415); 3 Burr. 1320; 1 Lev. 125; 1 Sid. 174; S. C. 1 Keb. 203; 1 Vent. 304; 8 Mod. 820; 1 Str. 193. A false conspiracy between divers persons shall be punished, although nothing be put in execution. *Poulterer's case*, (9 Coke, 55.) If two or three persons meet together and conspire, it is of itself an overt act, and an indictable offence. *Regina v. Bass*, (11 Mod. 55.) The conspiracy must affect the public. *Wheatly's case*, (2 Burr. 1125); *Young's case*, (3 Term R. 104); 6 Mod. 42; 2 East's P. C. 816. See also Hawk. P. C. b. 1, c. 80, 43; Ass. 38; Bro. Indt. 40; Presentment 12, Crown 80 do.; 2 St. of Ed. I. 1304; Keble's St. p. 69; St. 23 Ed. III. c. 5; 3 Hen. VI. c. 1.

The English and American reports abound with cases of conspiracies of various kinds. This particular kind of conspiracy is not new in England or this country. In 1721, the journeymen tailors of Cambridge, in England, combined to raise their wages, and were indicted and convicted. *Rex v. Journeymen Tailors*, (8 Mod. R. 11.) More recently, the introduction of machinery gave rise to *Trades Unions*, which endangered the safety of persons and property; and the utmost energy of the government was required for the preservation of the laws and the protection of the community. There have been many cases in this country, especially in the state of New York. There has been no difficulty in suppressing them, for their spirit is anti-republican, and public sentiment has aided the law in checking the mischief. All monopolies are anti-republican. To prevent a man from working lawfully, as he pleases, and for whom he pleases, is an invasion of the liberty of the subject. What can be more tyrannical, than for the journeymen of any trade to combine and take preventive measures, that no man shall work

or be employed in their trade, unless he pays them for admission into their society, and submits to their dictation and rules? No choice is allowed. There is absolute and overbearing compulsion. It may be said it is not right to select only the boot-makers for punishment, when other trades and professions have acted on the same principle. Lawyers have had bar rules, and physicians their tariff of fees. But one conspiracy is no justification for another. The members of the Suffolk bar abolished their bar rules some years ago. Public attention was directed to the principle of such associations, in consequence of a discussion of the *ten hours system*, and the bar took the lead in abolishing its rules.

I shall produce the constitution of the *Journeyman Bootmakers' Society in Boston*.

I shall then show that the defendants belonged to it; their interference to control journeymen and masters in their contracts and business; and the consequences of their proceedings.

If any question should arise, whether an original or recent member of the society be equally guilty, I shall contend for the principle laid down in *People v. Mather*, (14 Wend. 259,) where the guilt was held to be the same, whatever was the time of joining. I shall rely, for the sufficiency of the counts, on the following cases. *Commonwealth v. Judd*, (2 Mass. R. 337); *People v. Melvin*, (2 Wheeler's Crim. Ca. 262); *People v. Fisher*, (14 Wend. 9); *People v. Mather*, (4 Wend. 259.)

The county attorney then called the witnesses for the commonwealth. The testimony was very full, but the substance is given in that of the following witnesses:

Isaac B. Waitt, bootmaker, in School street, testified that he had employed journeymen mostly members of the society; never had a "strike" in his shop. Whenever he was told that one of his hands had not signed the rules, he would advise him to do so. Jeremiah Horne refused to, and he discharged him and advised him to go to Randolph to work. At the time of the general "strike," he was urged very strongly to sign a paper

agreeing to pay the society's prices ; he refused his signature at first, but in a few days complied with their request. The wages fixed by the society were not unreasonably high. Witness had heard Hayes, one of the defendants, say, that John Cleary and William Cleary, who were fined three dollars each by the society, paid this penalty. Jeremiah Horne was fined for doing some extra work on the heels of a pair of boots, of his own accord, and not charging extra for it. Witness was informed, that if he allowed the extra charge for the work done by Horne, the fine would be taken off. He did so. Had not been injured or impoverished by the society, because he always endeavored to make peace. The society men were all good workmen. Did not feel at liberty to employ any but society men. Would not wish to lose five or six good workmen for the sake of one. Had not been injured or impoverished thus far ; but he knew the rules of the society, and the consequences that would follow, if he should violate them.

Dennis Horne, a journeyman, said he had never suffered from the interference of the society. Had heard Mr. Harrington and Mr. Hayes reckon up the fines which had been imposed upon Jeremiah Horne, before he could be permitted to join the association. The whole amount was seven dollars. He was fined one dollar for going off with the books ; fifty cents as an initiation fee ; fifty cents for the breach of a rule ; and five dollars for slandering the society. Witness undertook to settle this affair with the members. Mr. Woods said he supposed that if the society would give Jeremiah Horne one hundred dollars, he would settle it. Told him that Horne didn't want the money, but only wanted his rights. Mr. O'Neale asked Horne if he intended to be a witness against the society. Witness told him that Horne did not ; and that Horne considered himself as deep in the mud as they were in the mire. Some further conversation followed, but nothing was done at the time. At the last meeting of the society, on the first Monday of October instant, Mr. Hunt, one of the prisoners, was the presi-

Commonwealth v. Hunt and others.

dent, and Mr. Odiorne, secretary. Did not stay till the close of the meeting. Mr. Farrington got up and said that the witness could withdraw for the evening, if he desired. Witness replied, that he did not wish to retire — he wanted to see the last of every meeting. Another member then said, that he hoped the witness would never see the last of the meetings. Another cried, "Heave him down stairs; kick him out!" Mr. Odiorne then moved, that the meeting be adjourned for the evening, as no business would be done while the witness remained. Witness seeing they were about to break up, told them he would retire. Mr. Odiorne then observed, that this would look very hard before the grand jury, that he was turned out of the room. He said also, that the witness was going before Mr. Parker, the county attorney; that Mr. Parker had a long head, and would question him pretty tight. Witness then went down stairs, and as he was retiring, heard one of the members say, "he's kicked out." The witness joined the society with the hope of raising the price of wages. Flour was higher than it is now, and wages were lower. The members had a "strike" soon after the formation of the society, and raised the price of wages. Witness said the boots were made better now than in 1835, but that the wages were not so good, and more time was spent upon them than formerly. Had known the society to take a vote about leaving a particular shop, and carry it; also had known them to sustain a member who was on a "strike." There had been two general "strikes" since the formation of the society. At a "strike" on Mr. Howard's shop, the society voted to pay the members out of work one dollar per day. Mr. Howes, a member, received three dollars on another occasion, for holding out on a "strike" against another man.

Davis Howard, master bootmaker, said he had had some trouble on account of the society. He did not feel himself at liberty to employ any person who was not a member of the society. The first "strike" was made in 1835. A fair work-

man could then make about five pairs of boots a week. The work is now done considerably better, and a man can make about four pairs a week. The wages of journeymen are not unreasonably high. The better work now done on boots is not the consequence of this combination. Thinks the same prices are paid for work on boots to persons who are not members. There was a general rise on the expenses of living, at the time the society was organized, and also in 1836.

John S. Kimball opened for the defence substantially as follows:— This case is a novel and extraordinary one in this commonwealth, and the act charged, if an offence at all, must be in the nature of restraint of trade, and the offences which are found in 7 Dane's Abr., under the head of crimes against public policy, p. 37, art. 4, s. 5. The crime of conspiracy requires the ingredients of falsity and malicious purpose, according to 1 Hawk. P. C. c. 72–87. In 1 Wheeler's Crim. Ca. 142, and 2 Ib. 262, are indictments for acts done in restraint of trade, sustained in the court of sessions of New York city, but overruled in 9 Cow. 578. In *People v. Fisher*, (14 Wend. 9,) an indictment to do an act injurious to trade was sustained under the Rev. St. of New York, which provided that a conspiracy to commit any act against the public health, morals, trade, or commerce, should be indictable, but no such statute exists in Massachusetts. A conspiracy is a combination to do a lawful act by unlawful or criminal means; or to do an unlawful or criminal act by lawful means. There are many cases of conspiracy in the American reports, but no decision conflicts with this definition. (Mr. Kimball here cited and commented on the various cases of conspiracy in the United States.) † In Pennsylvania, Maryland, New Jersey, Virginia, North Carolina, South Carolina and Alabama, cases have also occurred of conspiracies to defraud, or to do acts expressly forbidden by law. But no American case has yet been produced of any indictment sustained for a conspiracy, unless to commit an act in itself unlawful or criminal, or expressly forbidden by statute; and this indict-

Commonwealth v. Hunt and others.

ment falls within neither of these classes of cases. The indictment, therefore, cannot be sustained, unless the court falls back upon the law of England ; but this part of the common law was never brought to this country. (1 Bl. Com. 106.) The law of England, in regard to conspiracies in restraint of trade, has never been " adopted, used, or approved, in the colony, province, or state of Massachusetts Bay," nor practised on in our courts ; nor in any other state in the union, except by virtue of its statutes.

But even if the common law upon this subject exists here, as is claimed, this indictment cannot be sustained, because the acts alleged to have been committed are not unlawful or criminal. If they were unlawful or criminal, they were private injuries, and whether public or private, no wrongful and corrupt intent is proved. The first count is for injuring divers persons by refusing to work for them ; but this is not unlawful or criminal. The law of the Plymouth colony, that a laborer should not have over twelve pence a day and his diet, (Col. Laws, p. 61,) and the price act in this state, passed 1777, limiting the price of farming labor to three shillings " and found," are repealed. The second count alleges a conspiracy to compel Isaac B. Waitt to dismiss from his employment Jeremiah Horne. But the means alleged to have been used are not unlawful, and the act, therefore, not indictable. The same remarks apply to the other counts. All the injuries alleged to have been done or intended are private, and not indictable in England. *King v. Farner*, (13 East, 229.) See also *People v. Miller*, (14 Johns. 371.) The injured individual must resort to his civil action.

It is not proved, that any injury has been done or intended in this case. We have the express agreement of the accused among themselves ; and it does not express or imply any intent to injure third persons, or do an unlawful or criminal act. They agreed, for purposes beneficial to themselves, without intending to injure others. The acts done under it have been lawful, and have not violated the rights of others ; and it was a part of

their agreement that nothing should be done under it, violating the laws of the commonwealth. There is no evidence that any master-workmen have been impoverished ; but on the contrary, the evidence shows that they have been benefited by the work being better done. There is no evidence that workmen have been impoverished. Sums contributed by the members have been voluntary. Those not members have been employed and as well paid as the members.

According to Mr. Waitt's testimony, he was not compelled to discharge Horne. He says no threats were used, and that he never was notified to discharge any one.

There is no evidence to sustain the third and fourth counts. The fifth count charges the defendants with conspiracy to impoverish Isaac B. Waitt, Elias P. Blanchard, Davis Howard, and others unknown. Neither of these persons has testified that he has been injured or impoverished by the society. But other witnesses have sworn that they have been benefited by reason of the improved work. We might rest our case here, for the indictment is not supported by the evidence. But we shall now introduce witnesses to show that the operations of the society were intended to be, and have been, innocent, and beneficial to workman and employer and to the public. We shall also prove that similar societies have existed among the members of the legal and medical professions, and in almost every kind of business in which large numbers are engaged ; and that it has been the custom of the people of this country to combine for any and every purpose not criminal or forbidden by law ; and that such custom, being universal and immemorial, is a part of the common law of the land.

The testimony for the defence was then introduced :

George Field, master bootmaker, said his was not a society-shop ; he had employed men who were, and men who were not members of the society. Thought the society had been a benefit to him. The work had been better of late ; twenty-five per cent. better than in 1835. The members of the society were

generally good workmen. On cross-examination, he said he employed generally two men at a time ; sometimes both had been society men ; sometimes one a society man and the other not. Never had been threatened in any way by the society, respecting the employment of men.

Asa Tyler, master bootmaker, stated that he had employed men who were not members of the society. Employed men who were members and men who were not, as he pleased. Thought he had been benefited by the operations of the society. The work was now done twenty-five per cent. better than formerly. Did not know any person that had been injured by the society. On cross-examination, said he generally employed one workman the year round, and some part of the year had two. Shop never had been struck against. Never had received a notice from any committee about the employment of workmen. Did not know whether the men were members of the society or not.

Elias Leach, of the firm of Leach and Whitney, bootmakers, said he had usually employed six or eight journeymen. Had always taken the liberty to employ such men as he pleased, whether members of the society or not. Never had any trouble in consequence of pursuing this course. Witness said the prices paid journeymen were not unreasonably high ; that the work had improved in quality nearly one-third, since the formation of the society. Was of opinion that the society had been a benefit to him, by establishing a uniformity of prices, and producing better work. Thought the men were more temperate now than formerly. Said it was the practice to remain idle on "blue Monday," as it was called, and sometimes the journeymen were "blue" all the week ; that these practices were now mostly passed away. Thought the society had a tendency to keep foreign boots out of the market, by finishing boots in a better style. On cross-examination, the witness said that he attended to the cutting part of the establishment ; that the work was now better, and the prices raised in proportion.

Other witnesses testified to the same effect.

Peter Runey, a journeyman bootmaker, said that he worked with Jeremiah Horne, last year, about six months; that Horne was not a steady workman; that he was a passable hand; that he had known him to be employed on a pair of boots a whole week, and not finish but one.

Edward Blake, testified that he was secretary of the association of the members of the Suffolk Bar, which had been dissolved. Witness exhibited a book, containing the signatures of members of the bar; also, a printed copy of the bar rules by which the association was governed. The witness then read the following rule, which was the only one having any bearing upon the case.

“Nor shall any gentleman assume the care of any action originated in this county by a person practising therein, not having subscribed these rules, unless such person, being a regularly admitted attorney of the court of common pleas, and not having been refused a recommendation to the supreme judicial court, or otherwise censured by a vote of the bar, shall, in writing, in a book to be kept for that purpose by the secretary, have declared his assent to these rules, and engaged to observe the same. Nor shall any gentleman advise or consult, or be in any manner associated, in any case whatever, with any person practising in this county, who shall not have subscribed these rules, excepting such attorneys, as aforesaid, of the court of common pleas.”

“We, the subscribers, members of the bar of the county of Suffolk, establish the following rates of compensation and fees, as the lowest which we can reasonably and honorably receive; and we bind ourselves not to receive less fees or compensation than are herein expressed, nor any commutation or substitute therefor, namely:” —

Witness could not say that any member of the bar had ever refused to work with any person not a member. This association was dissolved several years ago. On cross-examination, the witness said the association was dissolved June 18, 1836;

Commonwealth v. Hunt and others.

that the rules were first adopted in June, 1819; that at the dissolution of the association, some members of the legal profession united in a friendly and benevolent society, under the name of "The Fraternity of the Bar," without establishing any bar rules or rates of compensation; that this last association had been merely nominal, no meeting having since been held by the members.

James B. Gregerson, a member of "The Boston Medical Association," testified that it was not incorporated. He produced a book of signatures, and the rules of the society. He said that there was a rule in relation to "quacks," which prohibited a member of the association from consulting with a person not a member, and a provision for a board of reference for a settlement of disputes; that there were no fines provided for any breach of the rules; that there was a provision for the expulsion of members for violating the rules; that immoral or criminal conduct would not be a sufficient ground for expulsion. Witness thought the operation of the society had been beneficial to the profession and the public; that Dr. Bartlett, who was expelled from "The Massachusetts Medical Society," was a member of this association, and was expelled by a special vote.

David Chapin, said he was in the wood and coal business; that he did not belong to any association to regulate prices; that there was an association of dealers in wood, but that it was dissolved about a year ago; that the object of the society was, to ascertain who could be trusted with safety, and who could not; that there was a book kept by the society, called a "black list," which was still in existence. The witness declined to exhibit the book.

Other witnesses, who were dealers in wood and coal, testified to substantially the same effect.

Rantoul closed for the defence, substantially as follows:

As we have no statute concerning conspiracy, the facts alleged in the indictment constitute an offence, if any, at com-

mon law. But the English common law of conspiracy is not in force in this state. We have not adopted the whole mass of the common law of England, indiscriminately, nor of the English statute law, which passed either before or after the settlement of our country. So much only of the common law has been adopted as is applicable to our situation, excluding the artificial refinements and distinctions incident, to the property of a great commercial people; the laws of revenue and police; such especially as are enforced by penalties. (1 Bl. Com. 107, et seq.; 1 Tucker's Bl. Ap. 406.) Statutes do not bind colonies, unless they are expressly named. (2 P. W. 75; Chit. on Prerog. 33.) The English law, as to acts in restraint of trade, is generally local in its nature, and not suited to our condition. It had never been adopted here, and the colonies are not named in the statutes on that subject, which have been passed in England since they were settled. *Van Ness v. Pacard*, (2 Pet. 144); *Wheaton v. Peters*, (8 Pet. 658, 659); *Dawson v. Shaver*, (1 Black. 204.) The statutes 1 Ed. VI. c. 3; 5 Geo. I. c. 27; 23 Geo. II. c. 13; 14 Geo. III. c. 71; the innumerable statutes of laborers; and the statutes against seducing artisans, &c., illustrate this point. All the law we ever had on these subjects was domestic, and is now domestic. (See Plymouth Colony Laws, 28, 72, 76; Anc. Chart. 210; 6 Mass. 73.)

The original of the law of conspiracy is to be found in the state of society, and in the circumstances out of which grew the law of champerty, of which, or rather of maintenance, which includes champerty, the offence of conspiracy was originally a branch. During the absence of the crusaders, and while the fate of so many barons and lesser land-holders was unknown, infinite confusion in the possession of landed property naturally arose, both in Great Britain and on the continent. Bold men combining together, seized the estates of those who were absent, and sometimes presumed to be dead; and whenever their false claim came to be disputed, corrupted the officers of the crown,

Commonwealth v. Hunt and others.

and secured their connivance or sanction, by dividing the plunder with them. In France, although the trial by peers was already an ancient institution, and an essential element of the feudal system, yet the wager of battle was far more acceptable to the nobility of that kingdom, and the right of private war was unquestioned, except in the narrow compass of the king's domains. The vassals were bound to follow their lord in private war, not only against any other lords, (Beaumanoir, c. 59, 300,) but also against the king himself, whenever he had denied him justice in his court. (Etablissements de Saint Louis, L. I. c. 49.) Saint Louis indeed endeavored, first to mitigate, afterwards to abolish private wars, in the royal domain, but without success. In October, 1245, he published an ordonnance at Pontoise, (Ord. des Rois de France, T. 1. p. 56,) establishing the king's peace, which was a truce of forty days, after the cause of quarrel had arisen, before the war was allowed. He followed this by another ordonnance, providing for an application by the weaker party to the court of his Suzerain, to compel his antagonist to swear to keep the peace, for the violation of which oath he was liable to be hanged. (Ord. T. 1, p. 129.) In January, 1257, he totally prohibited all private war; but without effect, as might easily be shown, so that more than a hundred years afterwards, April 9, 1353, King John was obliged to issue a new decree, for the observation of the truce of forty days. (See Sismondi Hist. des Franc. viii. 77.) The obstinate adherence to this mode of settling quarrels, was common to all the German races, among whom it originated, while in their clannish state, when all who were connected by blood combined together, in case of an injury received, to execute the primitive law of revenge. *Suscipere inimicitias seu patris seu propinqui necesse est.* (Tacit. Germ. 21.) In these private wars, the barons seized each other's lands and castles, and thus indemnified themselves for any real or supposed injury.

The rules which governed such wars, and the efforts of the

French monarchs to abolish the right, are fully set forth in the 27th dissertation of Du Cange upon Joinville. At last, Louis XI. who freed monarchs from leading-strings, in December, 1451, while yet only dauphin, abrogated the 14th article of the liberties of Dauphiny, "*qui conserve expressement aux ceux de cette province le droit de se faire la guerre, de leur propre autorité,*" and thus put a final end to the practice.

In England, the feudal theory was the same as elsewhere, that every gentleman had a right to make war, as it is laid down by Beaumanoir, and "*oultre que gentilhomme ne pœut guerroyer,*" none but a gentleman could do so. The Saxons brought with them, says Hallam, (Middle Ages, Part I. c. viii.) *at least as much roughness* as any of the nations which overturned the Roman empire. . . . No people were so much addicted to robbery, and to feuds arising out of family revenge. The roughness of one of those nations is shown in the Salic law, forbidding the extreme exercise of the right of private war from being interfered with. If any one shall take down a man's head which his enemies have put upon a stake — *Si quis caput de homine, quod inimici sui in palum miserunt . . . deposuerit* — he shall pay six hundred deniers. (Pact. Leg. Sal. xliv. 10.) The Saxon laws fixed a rate of compensation for all wrongs, but no law ventured to forbid the vengeance of the kindred of a murdered man, and where the *weregild* or price of blood had not been paid, they justified and commanded the war. *Parentibus occisi fiat emendatio, vel guerra eorum portetur.* (Leges Edwardi Confessoris, c. 12.) The capitulary of Charlemagne, in 813, which ordains, that if any one wishes to fight against his adversary, his liegemen shall aid him or lose their benefices — *Si quis . . . contra adversarium suum pugnam — voluerit* — is even carried further by the laws of Henry I. which provide that all the kin shall join in the war, or renounce their family. Glanville, who died in 1190, considered private wars to be lawful in his time, that of Henry II.; and Henry III. seems to have entertained the same opinion, for, in 1233, he

Commonwealth v. Hunt and others.

defied the Earl Mareshall, *marescallum diffidavit*, that is, declared the bond of faith between them to be dissolved, and made war upon him. This defiance was the *legal* preliminary to a private war between them. (Const. Fred. I. 1187 ; Const. Fred. II. 1234 ; Fori Oscæ Ann. 1247, fol. 26, &c. &c.) A discussion ensued, in which the marshal alleged that he had always been willing to abide the judgment of his peers, but that the king had denied him justice, and forcibly entered his lands — *Semper paratus essem, stare juri et judicio parium meorum — terram meam violenter ingressus*. (Mat. Paris, H. iii. p. 391.) And having enumerated the wrongs which the king had done him, he goes on to say, that he was thereby absolved from his homage, and that it was *lawful* for him to defend himself. *Unde homo suus non fui ; — Quapropter licuit, et licet me defendere*. Nay, he argues further, that he should do a wrong to the king himself, and to the cause of justice, which the king is bound to maintain, in evil example to all others to desert the right, if under such provocation he did not resist. *Imo, facerem sibi injuriam et justitiæ, — Et malum exemplum darem omnibus, deserendi justitiam*. No objection on the king's part is made to this feudal logic, but the bishop who represents the king, denies the provocation, urges that the marshal should have waited till he had ocular proof of the king's designs against him, after which he admits that the war would be lawful — *et ex tunc liceret talia attemptare*.

It is not strange that this right of redressing their own grievances, should have been claimed by an English baron in 1233, since the great charter of King John, granted June 15th, 1215, in the 61st chapter, expressly provided for it. It is there agreed, that if the king shall violate the charter, the barons shall distress him by the capture of his castles and lands, and in all other modes that they can, and all persons were commanded to swear that they would do this ; by which provisions, says Mr. Thompson, (Essay on Magna Charta, p. 321,) "it should become their positive duty to levy war upon the sovereign, aided

by the whole nation, to 'distress and harass him' to the utmost of their power." The phrase in the famous 39th chapter, which secures the right of trial by peers, *nec super eum ibimus, nec super eum mittimus*, &c. alludes, no doubt, to the former practice of King John to levy war on his barons without legal cause, or form of law; for in a patent dated at Windsor, 10th of May, 1214, he had promised already not to dispossess his barons — *nec super eos per vim, vel per arma ibimus*. The remark of Sir Edward Coke, that the great charter is declaratory of the ancient law and liberty of England, and only a repetition of former privileges, which time or oppression had brought into disuse, applies to these chapters, as well as to the rest of that treaty. They are parallel to the stipulations in the ordonnance of St. Louis (Ord. des Rois T. I. p. 143,) and M. Guizot remarks upon them, that it is impossible to establish the right of force in a more positive manner. (Cours. d' Hist. Mod. 1830, xi. lec.)

(Mr. Rantoul then went on to describe the remains of private war, or customs growing out of it. The practice of overawing courts by large bodies of armed retainers, combinations thus to overawe, confederacies to prevent the course of justice, corruption of the judges by including them in the confederacy, and sharing the plunder with them, &c. of all which practices the instances are very numerous, and then examined the laws to prevent these evils.)

The original form in which the law of conspiracy appears in the legislation of the English parliament is in St. Ed. I. (A. D. 1304,) and includes in the definition only false and malicious indictments. 2 Inst. 561, 562; 2 Reeves's Hist. 2d. ed. 239, et seq.; 1 Hawk. c. 72, s. 1 & 2; 6 Petersd. Ab. 96. The early cases were those of such indictments. See Yelv. 116; 9 Co. 55 b; Cro. Eliz. 563, 871, 900.

The next stage of the law of conspiracy appears in the early editions of 1 Hawk. c. 72, s. 2: "That all confederacies wrongfully to prejudice a third person are criminal at common law;

as a confederacy by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child ; or to maintain one another in any matter, whether it be true or false." By "indirect means," unlawful means are meant.

The case of *The King v. Journeymen Tailors*, (8 Mod. 10,) was decided after Hawkins's work was published, and is not a part of the law laid down by him in his first editions. In that case it was held, that a conspiracy among workmen to refuse to work under certain wages, is an indictable offence. This case, if correctly reported, introduces new law, unless it was decided on the statutes of laborers. (See a compend of these statutes in Jacob's and Tomlins' Law Dict. *Laborers*. See also 1 Bl. Com. 426 ; 14 East, 395.) The doctrine of that case, therefore, is not a part of the law adopted in this state. It was not the doctrine of the common law, when our ancestors came hither, and is not suited to our condition. But the report of the case in 8 Mod. 10, is not to be depended upon. The book is of no authority, and entitled to no respect. (See 1 Burr. 386, where it is spoken of as "a miserable bad book, entitled 'Modern Cases in Law and Equity.' " See also in 3 Burr. 1326, a note by the reporter, as follows : "*Wonnell's case* being here cited from 8 Mod. 269, the court treated that book with the contempt it deserves, and they all agreed, that the case was wrong stated there. — I mean the old edition of that book.") The doctrine of the case is not supported by any previous decision. Yet this is the only authority for the repetition of the same doctrine, in the numerous books in which it is now found. Probably the indictment, in that case, was sustained on the statutes of laborers. Though the old precedents of indictments are *contra pacem* only, yet that is because a conspiracy to do acts contrary to those statutes is punishable at common law in England. *King v. Smith*, (2 Doug. 441.) 1 Bolton's Just. 170 ; 2 Ib. 2.

The statutes of laborers were blind struggles of the feudal

nobles, to avert from themselves the effects of great national calamities. Every one of these statutes had a local and temporary cause. In the famine of 1315, and the plague of 1316, parliament vainly strove to alleviate the universal distress, by fixing a legal price for provisions. Yet the scarcity increased, so that the king, going to St. Albans, "had much ado to get victuals to sustain his family." (1 Old Parl. Hist. 152.) And some months later, mothers ate their children. (Monk. of Malms, 166; Walsingham's Chronicles, 107, 108.) From the same motives, and with no better success, the plague of 1349 was followed by the statute of 23 Edw. III. (A. D. 1349.) the preamble of which is as follows: *Quia magna pars populi et maxime operariorum et servientium nuper in pestilentia moriebatur, nonnulli videntes necessitatem dominorum et paucitatem servientium, servire noluerunt, nisi salaria reciperent eccesiva, et alii mendicare malentes in otio quam per laborem perquirere victum suum: Dominus rex attendens que gravia exigentia presertim cultorum et operariorum hujusmodi provenire possent incomoda, super hoc cum prelati nobilibus et peritis et aliis sibi assistentibus deliberationem habuit et tractatum; de quorum unanimi consilio ordinavit.* The statute then goes on to provide, that every person able in body, under the age of sixty years, not having to live on, being required, shall be bound to serve him that doth require him, or else committed to the jail, until he find surety to serve. That if a workman depart from service before the time agreed upon, he shall be imprisoned. That the old wages, and no more, shall be given to servants. That if the lord of a town or manor do offend against the statute, in any point, he shall forfeit the treble value. That if any artificer or workman take more wages than were wont to be paid, he shall be committed to jail. That victuals shall be sold at reasonable prices. That no person shall give anything to a beggar, who is able to labor. That if any person take more than the usual wages, he shall pay the surplusage to the town where he dwells, towards a payment to the king of a tenth and fifteenth granted to him.

Then followed, in the next year, the remarkable statute, *de serventibus*, from which have been derived all the subsequent statutes of laborers. St. 25 Edw. III. ; 1 Parl. Hist. 274 ; Hansard, 62 ; 2 Reeves's Hist. 274, 2d ed. 388.) The preamble of this statute, after setting forth the former ordinance, goes on to say, that " now forasmuch as it is given the king to understand in this present parliament, by the petition of the commonalty, that the said servants, having no regard to the said ordinance, but to their ease and singular covetise, do withdraw themselves to serve great men and other, unless they have livery and wages to the double or treble of that they were wont to take the said twentieth year, and before, to the great damage of the great men, and impoverishing of all the said commonalty, whereof the said commonalty prayeth remedy ; wherefore," &c. It then goes on to prescribe the year and day wages of the servants and laborers in husbandry ; how much shall be given for threshing all sorts of corn by the quarter ; that none shall depart from town in summer where he dwelt in winter. Then the wages of " several sorts of artificers and laborers " are prescribed. It is then provided, that shoes shall be sold as in the 20th Edw. III. (before the pestilence,) and that artificers shall be sworn to use their crafts as they did in that year. Then the punishments of persons offending against the statute are prescribed. The punishment was imprisonment until sureties should be given for a compliance with the statute, and double the amount of excess of wages or prices received was to be forfeited to the crown. Then sheriffs and other officers were forbidden to exact anything from such servants. The forfeitures of the servants were to be employed to the aid of dismes and quinzimes, granted to the king by the commons. The justices were to hold their sessions four times a year, and at all times needful. Servants who fled from one country to another were to be committed to prison.

The pestilence which gave rise to these statutes, was as gene-

Commonwealth v. Hunt and others.

ral and destructive as any recorded in history.¹ The deaths in London were mostly of the laboring classes: *Maxime operariorum et servientium*. (5 Rymer's Fœd. 693.) King Edward had just been debasing his coin. (Daniel in 1 Kennett's Hist. 224.) From these causes the wages of labor rose rapidly, and the law undertook to fix them. But, in spite of fines, imprisonment and the pillory, wages and prices continued to rise. (Knyghton's Chronicles, 2600.)²

¹ This pestilence was the great plague of Florence, described by Boccaccio, in which Villani, the historian, and Petrarch's Laura died. The king of France made a similar law to regulate wages of workmen, and for the same reason.

² Mr. Rantoul examined in the same manner the subsequent statutes of laborers: 34 Edw. III. c. 10; 12 Rich. II. c. 4; 7 Hen. IV. c. 17; 4 Hen. V. c. 4; 2 Hen. VI. c. 18; 3 Hen. VI. c. 1; 23 Hen. VI. c. 12; and especially 1 Edw. VI. c. 3, (A. D. 1547); 2 and 3 Edw. VI. c. 15; 3 and 4 Edw. VI. c. 16; which statutes continued or modified by 5 Eliz. c. 4, (A. D. 1562); and 1 Jac. I. c. 6, (A. D. 1604), were the law of England at the time of the settlement of Massachusetts, and were afterwards continued by 3 Car. I. c. 5, and 16 Car. I. c. 4, and were unrepealed at the time of the American revolution. By these statutes, (said Mr. R.) a mere refusal to work became criminal, for the first time. Such combinations are now legalized by 4 and 5 Wm. IV. c. 40. In 1355, the commons petitioned, "that the points of confederacy may be declared; considering how the judges judge rashly thereof." The king made answer: "None shall be punished for confederacy, but where the statute speaketh expressly upon the point contained in the same statute." (1 Old Parl. Hist. 269.) This petition related to rash judgments on St. Edw. I. concerning confederacies.

The statute of 1 Edw. VI. is curious, as showing the existence of slavery at that day. It is entitled an act for the punishing of vagabonds, and for the relief of poor and impotent persons. The second section of the act is as follows: "Secondly, that whosoever after the first day of Aprill next following, man or woman being not lame, impotent, or so aged, or diseased with sickness, that hee or she cannot work, nor hauing lands or tenements, fees annuities, or any other yearly reuenues, or whereon they may finde sufficiently their living, shall either like a sueruing-man wanting a master, or like a beggar, or after any such other sort be lurking in any house or houses, or loitering, or idle wandering by the high wayes side, or in streetes, cities, townes or villages, not applying themselves to some honest and allowed art, science, seruice, or labour, and so do continue by the space of three dayes or more together, and not offer themselves to labor with any that will take them, according to their facultie; and if no man, otherwise will take them, do not offer themselves to

Commonwealth v. Hunt and others.

The case in 8 Mod. 10, was about the time of the bursting of the south sea bubble, when laborers sought to withstand the operation of the state of affairs then existing. It appears from *Rex v. Hammond*, (2 Esp. R. 719,) that masters may be in-

worke for meate and drinke, or after they bee so taken to worke for the space agreed betwixt them and their master, doe leaue their worke out of conuenient time or runne away ; that then euery such person shall be taken for a vagabond, and that it shal bee lawfull for every such master offering such idle person service and labour, and that being by him refused, or who hath agreed with such idle person, and from whom within the space agreed of service the said loiterer hath runne away, or departed before the end of the covenant between them, and to any other person espying the same, to bring or cause to be brought the said person so liuing idle and loiteringly to two of the next justices of the peace there resiant or abiding, who hearing the prooffe of the idle liuing of the said person by the said space liuing idle, as aforesaid approoued to them by two honest witnesses, or confession of the partie, shall immediately cause the same loiterer to be marked with a hot iron in the breast, the marke of V. and adudge the same person liuing so idle, to such presentour, to be his slaue, to haue and to hold the said slaue unto him, his executours or assignes, for the space of two yeeres then next following, and to order the said slaues as followeth ; that is to say, to take such person adjudged a slaue with him, and onely giuing the said slaue bread and water, or small drinke, and such refuse of meete as he shall thinke meete, causing the said slaue to worke by beating, cheining, or otherwise, in such worke and labour (how vile soever it bee) as hee shall put him unto. And if any manner of slaue, either for loytering, or for the cause before rehearsed so adjudged, shall within the space of the said two yeeres heere appointed runne away, depart, or absent him from his said master by the space of fourteene dayes together, without licence : it shall not onely bee lawfull to his said master to pursue and fetch him againe by vertue of this Act, but also, to punish such faulte by cheines or beating as is aforesaid : and against the deteinour, if any man doe willingly deteine him, knowing him to be a slaue, as is aforesaid, to haue an Action of Trespasse, and recover thereby in damages tenne poundes, besides the costs and charges of the suite for so deteining his said slaue. And further, every such master shewing and proouing by two sufficient witnesses, the saide offence and faulte by his running away before two Justices of the Peace of the same Countie, whereof the one to be of the *Quorum*, the same Justices shall cause such slaue, or loiterer to be marked on the forehead, or the ball of the cheeke with an hot iron, with the signe of an S. that he may be known for a loiterer and a run away, and shall adudge the said loyterer and run away to be the said master's slaue for ever. And if such slaue shall the second time runee away, or absent himselfe, if the said master shall approoue the same second running

Commonwealth v. Hunt and others.

dicted for showing too great indulgence to their workmen, by raising their wages above the usual rate. Is this the law of Massachusetts?

In most of the United States, conspiracies that have been held indictable at common law, are all for acts that are indictable, immoral, or forbidden by statute. *State v. Cawood*, (2 Stew. 360); *State v. Buchanan*, (5 Har. & J. 317); *Respublica v. Herice*, (2 Yeates, 114); *Collins v. Commonwealth*, (3 S. & R. 220); *Commonwealth v. McKisson*, (8 S. & R. 420); *State v. Murray*, (3 Shepley, 100); *State v. Younger*, (1 Dev. 357); *State v. Tom*, (2 Dev. 569); *State v. De Witt*, (2 Hill's (S. C.) R. 282.) In New York and Massachusetts, the cases have gone further; and in *Commonwealth v. Judd*, (2 Mass. 337,) Parsons, C. J., says a conspiracy is "the unlawful act, or even a lawful act for unlawful purposes." And all the Massachusetts cases come within this definition. *Commonwealth v. Ward*, (1 Mass. 473); *Commonwealth v. Tibbetts*, (2 Mass. 536); *Commonwealth v. Kingsbury*, (5 Mass. 106); *Commonwealth v. Warren*, (6 Mass. 74); *Commonwealth v. Davis*, (9 Mass. 415); *Commonwealth v. Manley*, (12 Pick. 173.)

So all the New York cases come within the same definition, until since the revised statutes of that state were passed. Under those statutes it is held indictable for workmen to conspire to

away with two sufficient witnesses, before the Justices of Peace, in their general and quarter Sessions, then every such faulte and running away to be adjudged felonie and such loyterer and runne away to be taken as a felon, and thereof being lawfully intited and atteinted, or otherwise, condemned, to suffer paines of death as other felons ought to doe." The statute of Vagabonds, 3 Edw. VI. declares, "That such common labourers, being persons able in body, using loitering, and refusing to worke for such reasonable wages as is most commonly given in the partes where such persons shall dwell, shall bee for every such time as he or they refuse to labour, having reasonable wages as is aforesaid, adjudged vacabons, and shall be punished as strong and mighty vacabonds," &c.

Commonwealth v. Hunt and others.

raise their wages, by combining to compel journeymen and master-workmen to conform to rules established by the persons so combining, for the purpose of regulating the price of labor. This was decided to be a conspiracy "to commit an act injurious to trade or commerce." *People v. Fisher*, (14 Wend. 1.) A conspiracy to commit a mere civil injury to an individual is not indictable. *The State v. Rickey*, (4 Halst. 293); *The King v. Turner*, (13 East, 228); *Rex v. Pywell*, (1 Stark. R. 402.) Yet nothing more is properly alleged against the present defendants. A conspiracy to raise wages would not be indictable in England, if it were not unlawful for an individual to attempt to raise his wages. And the indictment, in the case at bar, is bad, because each of the defendants had a right to do that which is charged against them jointly. All the counts in the present indictment are fatally defective; first, in not averring any unlawful acts or means; secondly, if any such acts or means are averred, in not setting them forth. The vagueness and generality of the charges are such, that *autrefois convict* could not be pleaded to a second indictment for the same acts. When the end is not unlawful, the means should be set forth. *Commonwealth v. Warren*, (6 Mass. 74); *Lambert v. The People*, (9 Cow. 578.) Mere combination is nowhere said to be unlawful, except in 8 Mod. 10.

(Mr. Rantoul also argued at length, that the jury were judges of the law as well as of the facts in the case.)

Parker closed for the commonwealth, in substance as follows:—Four questions arise in this case. 1. Is there such a club, society, or combination, as is described in the indictment? 2. Do all these defendants belong to it? 3. Are its objects such as are set forth? 4. Is a combination, to effect these objects by force and coercion, lawful?

1. There is no doubt of the existence of such a society. It is fully proved, and now confessed. The hesitation in admitting it; the technical difficulties interposed as to the proof of its existence; the refusal to produce the constitution and re-

cords, are strangely contrasted with the statement that the society is lawful and praiseworthy. We have now the constitution before you, showing the existence of the society, which was admitted when the fact of such existence could be no longer denied. 2. Do the defendants and each of them belong to it? You have positive proof of this also. 3. Are the objects of this society such as the indictment sets forth? This also is proved beyond a doubt. The printed constitution shows it. The operations of the society, as proved, show it. The constitution and rules of the society are before you, although there was a strong endeavor to prevent their appearing in evidence. They usurp a power to govern men, not by the laws of the land, but by the laws of their club. (The objectionable rules were here read and commented on.) These passages and the testimony of Waitt, Horne, and the other witness prove the allegations in the indictment beyond a doubt.

The society may have some good objects, and do some good; but it is oppressive both upon journeymen and masters, and intended so to be, — a coercive, rigid, persecuting society, to all who refuse to be members. In this particular it differs from the other combinations — those of the bar, of physicians, woodwharfingers, and others. Even if others have been culpable, it is no excuse to the defendants. But none are shown with rules and measures so coercive and unlawful. As to the bar rules, which have been so often cited in connection with the names of Chief Justice Shaw, of the judge of this court, the attorney-general, and others, if it were necessary to defend them, it may be said that they are wholly unlike those of the defendants, proved in this case, and stand on very different principles. You will have both before you and will compare them. I will refer you to some of the statutes of the commonwealth, and some rules of the courts, and the difference will be clear. Statutes 1782, c. 9, s. 4, p. 66; 1785, c. 23, s. 1, p. 199; 1789, c. 58, prevent all bar monopolies, and distinguish this case from the bar rules. 2. The rules of the courts; 1 Big. Dig.

Commonwealth v. Hunt and others.

236, rules 6 and 7 ; and title *Champerty*, is same, will be found essentially dissimilar in principle from those of this society of bootmakers. But even these bar rules were dissolved long ago.

But one consideration remains : Is such a combination as has been proved, lawful ? This is a question of law, and your verdict passes on the law as well as the fact. The gentleman who closed the case for the defence has argued, at great length, that you are judges of the law as well as the fact. There is a difference prescribed in our law between the oath of jurors in a civil from that in a criminal court. You are sworn to give a verdict according to the evidence ; you are to have evidence of the fact and evidence of the law. From witnesses on the stand, you receive the evidence of the fact. Where are you to get evidence of the law ? Are you, in the midst of a trial, to read the hundred law books produced on either side ? Counsel may read authorities, but you have here a *constitutional witness*, who is to testify what is the law. The judge is selected and appointed for that purpose, and it is his bounden duty to instruct you what is the law. He is sworn to tell you truly and conscientiously, and you are to believe his testimony, as you would that of a witness upon the stand. This is the true theory, and removes a great weight of responsibility from you. If the court rules against the prosecution, there is no revision ; but if against the prisoner, he may file exceptions, and proceedings are stayed, until the highest tribunal settles the point. This shows that jurors do not settle the law ; for if they did, no prisoner could have a new trial. Judges could not set aside the verdict.

The criminal law is not so uncertain as has been represented. It is fifty years since the revolution, and we have gone to the common law for all definitions of crime. We have gone on safely and securely. The proof of the common law is in judicial decisions ; and it is upon these that I rely. The common law is as much a standing law, as certain, as much a law of the land, made so by the constitution, as the statute law. Conspiracy is a crime, by the common law or statute law, of every state in

the union. (The cases and statutes were here cited and commented upon.) I place this case, then, upon the law of the adjudged cases in this commonwealth, as based upon the English common law, adopted before and since the revolution, and continued by the sixth article of our constitution. By the law of this commonwealth, the supreme court are the ultimate judges of the law. They have decided that conspiracy is an offence at common law, as adopted in Massachusetts, and by their decision and that of this court you must abide.

In the course of the trial, *Grant Leonard* was called as a witness for the prosecution, and, upon cross-examination, he was asked "what was the price of flour in the year 1835, when the society was established?" To this question *Parker* objected, on the ground that it was irrelevant to the issue on trial, and that the answer, whatever it should be, could have no tendency to prove or disprove the issue. *Rantoul* argued, that it was, in his opinion, material to show that the object of the defendants, in forming their association, was both innocent and lawful; inasmuch as their object was to raise the price of wages only in proportion to that of flour and the other necessities of life. To this it was replied, that the defendants were not on trial for a conspiracy to raise their wages, but for other unlawful purposes. As there was no allegation in the indictment that the defendants had conspired to raise the price of wages, it was not necessary for the defence to enter into the boundless field of inquiry as to the price of the necessities of life. But, on the contrary, it was contended, that at the time of the formation of the society, all orders, ranks and divisions of society, throughout the country, had combined to raise the price of their commodities, and that everything useful or necessary was at a high fictitious value; that these journeymen bootmakers had combined only for the same purpose, in self-defence, and that what was lawful for others was innocent in them.

THACHER, J. I will not stop to inquire whether a conspiracy to raise the price of wages, or any other valuable commodity, is

Commonwealth v. Hunt and others.

not a misdemeanor at law, as is expressly laid down in some authorities, which have always been held in great respect. It is only necessary, for the decision of the present question, to inquire what is the issue on trial. The evidence must be confined to the issue, or we shall never get to the end of a trial. After careful examination of the several counts in the indictment, I find no charge against the defendants of a conspiracy to raise their wages. The gist of the charge is, for conspiracy to prevent master bootmakers from employing any journeyman who is not a member, and to compel all other journeymen of the craft to become members of the society, and to submit to their unlawful rules. If the object was merely to maintain a rate of wages in reasonable proportion to the price of other commodities, it might be pertinent to show the price of flour. But as the defendants are not charged with conspiring to raise their wages, and cannot be found guilty of that offence, if it is one, I am of opinion that it is not relevant or pertinent to the present issue, to inquire into the price of flour, or other necessary articles at the time the club was formed. The constitution and rules of this society have been read in evidence, to prove that a conspiracy existed among these defendants and others, for the purposes charged in the indictment. It will be for the jury to settle, whether the book proves, or tends to prove, with the other testimony, that fact. The book must speak for itself, and is open to the comment of the learned counsel. Whether the object of the club was good or bad, can derive no light from an inquiry into the price of flour. Without meaning to limit the comments of the counsel upon the evidence, I must remark that an ostensible good motive cannot excuse a real infraction of law; that one crime will constitute no justification for another; and that it is no excuse for these defendants, if they have incurred the guilt charged in this indictment, that others have committed a like offence.

To the ruling of the court, excluding this question, the defendants' counsel excepted.

THACHER, J. charged the jury as follows : — Your patience, gentlemen, has been already so well disciplined in the hearing of this cause, that I think you will not grudge the few moments which remain, and which the court may occupy in committing it to your final decision. The learned counsel on both sides have not been restricted in their course, and have eloquently and faithfully done their duty. I do not regret the time which they have occupied, nor the minute and extensive learning which they have expended on the cause, although it will not be possible for the court to do justice to it at this time. But it will become the court also to exercise like freedom ; the more especially, as there is a higher tribunal to which the defendants may apply, if they should feel aggrieved or injured in any opinion or matter of law. The counsel for the defendants asserted to you, when he commenced his closing argument, that his clients were on trial for an offence unknown to the laws or practice of this commonwealth. As he has been met with a counter assertion from the attorney of the commonwealth, you have the opinions and assertions of these learned jurists opposed to each other in argument, on a point which lies at the foundation of this prosecution. It is very true, that your verdict is to be compounded both of law and fact. If you pronounce the defendants guilty, you will, in effect, declare, that conspiracy is an offence against the common law of this commonwealth, and that the defendants have incurred the guilt of that crime. But if you undertake to find the defendants not guilty, because you believe that no such offence is known to our law, and without an examination of the facts proved against them in evidence, you will, I think, assume a degree of responsibility which is not devolved upon you by the obligation of your office as jurors.

You are sworn to try the issue between the commonwealth and the defendants, "*according to your evidence.*" (Rev. St. c. 137, s. 7.) Whether the charge in the indictment is an offence in law, is, so far as you are concerned, a question of fact, and is to be settled, like other facts in the case, by evi-

Commonwealth v. Hunt and others.

dence. If the contending parties agree in the law, their consent will be good evidence of that fact. But where they are at variance on this point, you can only look to the judge for evidence, as he is a sworn witness in matters of law, and bound by his office to state the law to you truly, according to his knowledge and belief. If the defendants should find themselves aggrieved and injured by the opinions and instructions of the court, it will be the duty of their counsel to except to such erroneous matter, that the same may be carried to the supreme judicial court, for deliberate revision and correction by that tribunal. But if you should go counter to the evidence which you should so receive from the court, and should assume to say that the law is otherwise, you perceive that you will take upon yourselves the whole responsibility, and may, while acquitting offenders on such ground, do an act of injustice to the whole community. So far as the question of guilt or innocence depends on matter of fact, you are the final and responsible judges, and your verdict is conclusive. But if the court should err in matter of law, to the prejudice of the defendants, there is, happily, an appeal to a higher tribunal.

That conspiracy is an offence against the common or unwritten law of this commonwealth, I infer from the fact, that there have been frequent trials and convictions for this offence before our supreme judicial court. But it has been argued by Mr. Rantoul, with great earnestness, and by appealing to a great array of authorities, that no indictment for conspiracy will lie, unless it be founded on a combination of two or more persons to commit a *criminal* act, which would of itself be an indictable offence. But this is not, in my opinion, a correct estimate of the law. At the supreme judicial court in the county of Suffolk, February term, 1808, Abel Boynton and four other persons, were indicted and convicted of a conspiracy to cheat and defraud Bond & Bryant, merchants in Boston, by false pretences. The conspirators sent Goodhue, one of their number, to Messrs. Bond & Bryant, and by means of an artful story only, which

he was instructed to tell, and which they were to confirm, if his word was doubted, all which is set forth in the record, he obtained from Bond & Bryant a quantity of goods amounting to three hundred and eighty-three dollars and fifty-six cents, which the conspirators divided among themselves. The court consisted, at that time, of Francis Dana, chief justice, Robert T. Paine, Simeon Strong, Theodore Sedgwick, Samuel Sewall and George Thatcher. The attorney-general, who conducted the prosecution, was James Sullivan. The counsel for the prisoners were Theophilus Parsons, afterwards chief justice, and the late Timothy Bigelow and Moses Everett. The counsel for the defence contended, that a confederacy to defraud another was not a criminal act, unless the fraud itself was indictable at common law. It was true, that the defendants had concerted together a gross fraud ; but it was executed by one of their number only, and by means of a naked lie. The remedy, therefore, was to be obtained only in a civil action. But the court instructed the jury, that if they believed that the defendants had confederated together to perpetrate the offence, and that to each was assigned his part to act, if necessary to its success, they must convict all ; inasmuch as the offence consisted in the confederacy to do an unlawful act. This case has great weight in my mind, because it was decided before the act was passed, which made it an indictable offence to cheat another by false pretences, and by judges who were familiarly acquainted with our common law before the adoption of our state constitution.

The defendants were convicted, and sentenced to sit in the pillory and to be imprisoned in the common jail.¹ An indictment for a like offence was tried at the same term of the supreme judicial court, February, 1803, in Suffolk. It was the case of the *Commonwealth v. Robert Pierpont and another*, for a conspiracy to de-

¹ The judge said, that he attended this trial, and he read from a manuscript a note of it which he took at the time. The act against cheating by false pretences was not passed until 1815, c. 136, which has since been taken into the revised statutes, c. 126, s. 32. See *Commonwealth v. Hershell*, ante, p. 70.

Commonwealth v. Hunt and others.

fraud underwriters. They were defended by Mr. Parsons ; but were convicted and sentenced to a like punishment.¹ Both these cases were decided before the commencement of the publication of the series of reports in this commonwealth. But the law will be found to be so held by the court, in the case of the *Commonwealth v. Warren*, (6 Mass. R. 72,) and in that of the *Commonwealth v. Judd*, (2 Mass. R. 329.) In addition to this evidence, the legislature have recognized the offence of conspiracy at common law, without attempting to define it. [Act of 1832, c. 1830, s. 3 ; also, see Rev. St. c. 82, s. 28, and c. 86, s. 10.]

You perceive, then, that the defendants are on trial for a conspiracy ; and it is an offence against the law of this commonwealth for two or more individuals to combine to commit an unlawful act, or even to do a lawful act by unlawful means, to the injury of the public, or of any individual. (*Commonwealth v. Judd*, 2 Mass. R. 329, per Parsons, C. J.) The gist of the offence consists in the unlawful confederacy, and it is complete when the confederacy is made ; and any unlawful act done in pursuance of it, is no constituent part of the offence, but merely an aggravation of it. Two persons must join to commit the offence, and may be involved in its guilt. If such an offence has been committed in the present case, and you should find, that any one of these seven defendants was engaged in its commission, you will have the right to find him guilty, although you should acquit all the others ; because the offence is described in the indictment to have been committed by the defendants "with divers other persons, whose names were unknown to the jurors." Some of these defendants may be guilty, and the rest innocent. You must, therefore, pass on the case of each, as though he alone was on trial. One offence only was intended to be charged ; but it is described in five different ways or counts, to meet the testimony on the trial. If you find that the proof fails as to any one or more of the counts, your verdict must go

¹ This case led to the law of March 8, 1803, "to prevent the wilful destruction and casting away of ships and cargoes." See Act of 1802, c. 136.

no further than the evidence will warrant, and there must be an acquittal of the residue.

In what is the guilt of the defendants charged to consist? This question is to be answered by an inspection of the indictment. The defendants are journeymen bootmakers, and have formed themselves into what is called elsewhere, a "trades-union" society; and I may remark here, that whether they were all members at the time of its original formation, or voluntarily joined themselves to it afterward, they are, in the eye of the law, all involved in the guilt of the conspiracy, although that may, as to each, vary both in amount and aggravation.

1. The charge in the first count of the indictment is, substantially, that the defendants, intending to form themselves into an unlawful club, and to make unlawful by-laws, by which to govern themselves, and other workmen in their art, and unlawfully to extort great sums of money, conspired together and agreed, that none of them should thereafter, and that none of them would, work for any master or person whatever in their art, as bootmakers, who should employ any workman or journeyman or other person in that art, who was not a member of the said club, after notice given to him to discharge such workman from his employ. Although this agreement is declarative of a negative act only, yet you are to consider whether it was not intended to have a compulsory and injurious operation upon master bootmakers, and on journeymen bootmakers who were not members of their society. It is undoubtedly true, that each of these defendants might lawfully refuse, individually, to work for any one, as he should think fit. The illegality of the agreement consists in the design and tendency, by a concentrated action, to injure and control others. If the defendants intended and expected, by means of this confederacy, to benefit themselves, at the expense of the rights of others, and by an unlawful invasion of those rights, it was an offence. It is an unlawful means to effect an unjust and injurious purpose.

2. The second count charges a general confederacy of the

Commonwealth v. Hunt and others.

defendants, with others, not to work for any bootmaker who should employ any workman not being a member of a certain club, called the "Boston Journeymen Bootmakers' Society," or who should break any of their by-laws, unless such workman should pay to the club such sum as should be agreed on as a penalty for the breach, and that by means of that conspiracy, they did compel one Isaac B. Waitt, a master cordwainer, to turn out of his employ one Jeremiah Horne, a journeyman bootmaker, because the said Jeremiah Horne would not pay a sum of money to the society, for an alleged penalty of some of their unjust by-laws. The illegality described in this count consists in the conspiracy to compel Waitt, who was not a member, and owed no allegiance to this society, to dismiss from his employment Jeremiah Horne, because he would not submit to pay a penalty, which they had no right to impose upon him. It alleges an unlawful interference by the defendants with a subsisting contract between other persons, in which they had no legal interest, nor right to interfere. I therefore consider it the allegation of a conspiracy to do an unlawful act to the injury of other persons. 3. The defendants are charged in the third count with conspiring to impoverish one Jeremiah Horne, by hindering him from following his trade, and thus depriving him of his means of subsistence; which is clearly an unlawful act. 4. The fourth count is a general charge against the defendants of conspiring to prejudice one Jeremiah Horne, and to prevent him from exercising his trade as a bootmaker. 5. The defendants are charged in the fifth and last count, with an unlawful conspiracy to impoverish Isaac B. Waitt, Elias P. Blanchard, Davis Howard and others, master cordwainers and bootmakers, employing journeymen bootmakers, who should employ any journeymen bootmakers who would not, after notice, become members of their club, or who should break any of their rules.

These several counts describe a confederacy, aggravated by unlawful overt acts, constituting the offence of conspiracy. Although it was lawful for these defendants, individually, to re-

fuse to work for any master bootmaker who should employ a journeyman not a member of their society, yet if they combined together to control, by the force of numbers, the employment of other persons, or to extort from any one the payment of sums of money not justly due, I consider that both the means and the object were violations of law. Such interference is repugnant to trade, commerce, and employment, which should be free to every citizen as the air which he breathes. It amounts to the crime of conspiracy; not by any written statute of the legislature, but by the common law of the commonwealth deduced from the constitution, and recognized as a fixed principle of government by the decisions of the highest judicial tribunal. When the people of this commonwealth adopted into their code the law of a foreign country, in whole or in part, that became our own law, and is not to be stigmatized as the law of England, of France, or of Rome. Almost all our laws, regulating trade and commerce, in their innumerable branches, have been drawn from the experience of other nations, and have regulated the intercourse of men in all ages, ancient and modern. Why should we not avail ourselves of the fruits of the wisdom and experience of other nations, as well as of the productions of their climates and the fabrics of their manufacturing industry? The nations of the earth are rapidly approaching to each other, and will finally constitute but one great family or brotherhood. But you cannot lawfully find either of the defendants guilty, unless you are satisfied, from the evidence, that the conspiracy existed. If, however, the conspiracy is proved to your satisfaction to exist, then the separate acts of each conspirator are chargeable to the whole body. For the offence supposes in its nature a community of guilt, for which all and each are answerable. Ordinary prudence is not usually sufficient to guard against the combined power of numbers, who act together in concert, with secrecy and craft, and to a common object. The rigorous application of the rule, that the acts of each are chargeable to all the conspirators, is absolutely necessary to prevent the offence.

Commonwealth v. Hunt and others.

What evidence has the government offered to prove the alleged conspiracy? The attorney of the commonwealth read a notice, which had been served upon the defendants and their attorneys, to produce at this trial the original constitution of the club, and the records of their proceedings. They were not bound to comply with this notice, as these documents might operate to their prejudice; and by the advice of their counsel, they have been withheld. But if this club was formed under a belief of right, and without intentional wrong, it would have availed much in favor of the defendants, to have produced the documents, and to have submitted themselves, like good citizens, to the judgment of the law. It would have shown, that if they had erred in principle, they were ready and desirous to correct their error. The benignity of the common law never deals in hard constructions. It is averse to pains and penalties, and delights to relieve the citizen, whose fault has flowed from the head rather than from the heart. The defendants have made no disclosure of their constitution and records, which are still locked up in their repository. The evidence of the existence and proceedings of the society have come to us in fragments. The strictest rules of evidence have been observed; and all illegal or doubtful testimony has been excluded. But the evidence, that there was such a society, and that the defendants were members, was so full and satisfactory, that their counsel have admitted the fact in their argument, and also that the printed constitution and rules, which have been read, are true transcripts of the original, which are in their possession. Were the unlawful acts and objects which are specified in the counts of the indictment, carried into effect? In other words, did the conspiracy rest in the hearts of the conspirators, or was it manifested and aggravated by overt acts? [The judge here read from his minutes of the evidence, the voluminous statements of the several witnesses.]

Was the conspiracy for an unlawful object? The constitution of this society is an important document; as, like a record,

it speaks for itself, and cannot be contradicted. Every member signs it at his initiation, and pays a fee. It is the soul of the club. You may have perceived in this case, as in other secret associations, the strength of the spirit of the society. The members who were called as witnesses, were not only careful to conceal their own share in its formation, but were most unwilling to reveal any fact which might tend to impeach their associates. In the preamble, the members pledge themselves to be governed by their constitution, and to support it "in all its bearings." They avow their intention to regulate their wages "by a concentration of feeling and action with their brother craftsmen." The association is to be as extensive as the "country," and to make itself felt throughout "its cities and towns." It is apparent that they expect, by this union, to regulate the trade of bootmakers; although they profess to intend "to do nothing in opposition to the laws of this commonwealth." You must judge, whether they do not propose, by means of this league, to control all masters, journeymen, and apprentices in their art; and to compel the people of the commonwealth to pay for their boots and shoes whatever price this society shall set. The association is called the *Boston Journeymen Bootmakers' Society*. (Art. I.)

They have a president, vice president, secretary, treasurer, trustee, a standing committee of five, and a board of judges of three, all to be chosen semi-annually by ballot. (Art. II.) The duties of these officers are particularly described, and serve to show the character of the association. The standing committee are required to notify all journeymen working in the city of the existence of the society, and to invite them to join it. (Art. VIII.) In the 13th article it is declared, "that any journeymen working in this city, who does not belong to this society, after being notified of the next society meeting, and not joining at that meeting, or at the one following, shall pay a fine of two dollars." How they are to be made to pay it, is provided for by the operation of other articles of the instru-

Commonwealth v. Hunt and others.

ment. They expected, in this way, to induce all journeymen, willingly or otherwise, to join this society. In thus combining to compel all the journeymen bootmakers of the city, under a penalty, to become members, they certainly assumed an unlawful control over their fellow-craftsmen.

By the 10th article it is declared, "that all disputes between employers and journeymen, are to be decided by the board of judges;" and it is required of the judges "to lay their decisions before the society, to be enacted upon as may be thought expedient." Thus, all disputes between journeymen and their employers are to be decided by judges chosen by the journeymen, from their own body, by themselves, and not in concurrence with employers. But not trusting to these judges, although of their own selection, their decisions, before they are carried into effect, must be referred to the society, to be enacted, not according to any fixed law, but according to their own sense of expediency. By the 11th article of that part of the constitution of this commonwealth, which declares the permanent and inalienable rights of the citizens, which even the legislature cannot repeal or infringe, to the detriment of the poorest member of the state, it is declared, "that every individual in this commonwealth has a right to be protected by the government in the enjoyment of his property, according to standing laws." By "standing laws," is meant, those which are made by the people themselves in the legislature, where every citizen is represented, and has a voice.

The 11th article of the declaration of rights, says, "that every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his property." But this society of journeymen bootmakers say, in their constitution, that the wrongs of journeymen received from their employers, and *vice versa*, shall be decided by their board of judges, in the first place, and that the decisions of the board shall be revised by the society according to their sense of expediency. The 15th

article of the declaration of rights declares, that "in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by jury ; and this method of procedure shall be held sacred." And in the twenty-ninth article of that instrument, it is declared "to be the right of every citizen to be tried by judges, as free, impartial, and independent, as the lot of humanity will admit." But you see that this society of journeymen intend that their disputes with their employers shall be settled by their own body of judges and by themselves, not allowing to employers a voice in the matter ; which seems evidently to be a palpable violation of the social principle. They have a right to agree to settle among themselves their own disputes. But they certainly transcend all right, when they assume to settle their disputes with others not members, by judges of their own choice, and according to their own varying notions of expediency.

You have seen that this society, by the 13th rule, claim to impose a fine on such journeymen as shall not, after notice, become members of their body, as well as on members who shall violate their rules. Their method to compel payment, although most arbitrary, is found effectual, keeping both employers and journeymen, whether members or not, in perpetual alarm. The offending journeyman is, in an indirect but certain manner, to be deprived of his employment, and the employer is to be compelled to dismiss him by the threat of a "strike." By the 2d section of the 13th article, "any member suffering himself to be erased from the society books, shall, on his reëntering, pay a fine of one dollar, together with his initiation fee and all arrearages." By the 14th article, "any member working for a society-shop, and knowing a journeyman to be at work who is not a member of the society, shall immediately give notice to the other journeymen, who on receiving such information, shall quit working for that shop." By the 3d section of article 12th, the

Commonwealth v. Hunt and others.

funds of the society may be appropriated to assist any journeyman belonging to the same, who may be ten days on a "strike." By a "strike," is meant, where all the journeymen leave their employer, because he keeps a person in his employment who is not a member.

The funds of the society are made up of the sums paid for admission, for fines, and the monthly contribution. Those who leave their work and live for ten days without employ for this cause, are to be supported out of this fund, until their employer, urged by the necessity of business, shall dismiss the offender, or "scab," as he is called in this new vocabulary, and recall them to their work. The marked journeyman is compelled, by the urgency of his situation, from loss of employment, to go to the society, and buy his peace, by paying all fines and penalties and an initiation fee, before he can be restored to his employment, on which he is dependent for bread. Is this the liberty, which the members of this respectable craft are entitled to enjoy by the constitution and laws of this commonwealth? The only authority which may rightfully impose a tax, in the shape of a fine or penalty, or in any other way, must be imparted by the legislature; it being provided, in the 23d article of the declaration of rights, "that no charge, tax, impost or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature." If the journeymen bootmakers are justified by law, in compelling, by this powerful machinery, masters and fellows to submit to the rules of this society, they will probably make new and still more burdensome regulations. But if the journeymen have this right, it will follow, that masters and employers have the same right to associate for their own protection, and to oppress the journeymen in their turn. For the law will extend equal protection to both. It will follow too, that every other profession, trade and occupation, in the country, will find themselves, at once, disfranchised of their ancient, and, as they supposed, well established rights and liber-

ties, and subjected to new, secret, and unknown tribunals, and to varying laws, by which their property will be taken from them against their consent, and without a trial by jury, according to what has hitherto been regarded the constitution and fixed law of the land.

This society claim to interfere with the freedom of the citizen to choose his own pursuit, and to labor according to his own judgment and ability. By the 10th article of their constitution, it is made the duty of the board of judges to determine, when called upon, "what journeymen shall work on the first rate of work; as no journeymen, they say, whose work is of the first rate, or who is able to make it such, shall be allowed to work on the second rate without a vote of the society." But attending solely to their own interest, "a member may, according to article 14th, continue to work in a shop, where one who is not a member is employed, if the number of members is not a majority;" that is, as I understand the rule, unless the "strike" upon the employer can do to him an effectual injury, so as to coerce his submission, the member need not leave his employment. You must, therefore, judge whether these members mean to "strike" upon a master, unless they can "strike" to some purpose. By the 17th and last article, a provision is made to perpetuate the existence of the society, against their own good sense, and the opinion of the majority of the members, "if any five of their number is willing to continue it."

In the defence of these individuals, it has been argued, that this club has done good rather than harm; and that its tendency has been hitherto, to improve the morals of the members, and to raise the quality of their work. It has been denied, too, that it has in its operation, tended to impoverish masters, or oppress journeymen. Upon all these points there was a full and free examination of witnesses, and it belongs to you to weigh their testimony with discrimination and candor. The question is not, whether the society have used their power to the extent of mischief of which it is capable, but rather, whether they

Commonwealth v. Hunt and others.

have not assumed a power not derived from the law, but repugnant to it, which in the hands of irresponsible persons, is liable to great abuse. It is, undoubtedly, part of the freedom of the citizens of this commonwealth to form themselves into societies for any innocent or lawful purpose, for mutual edification and charity, and for improving their nature and condition. This right has always been exercised without control; and until members shall avail themselves of their organization for some illegal purpose, it cannot be rightfully called in question. There is no doubt that these defendants and their brother craftsmen may assemble in societies, and discuss the value of their work, and the wages to which they are reasonably entitled for their skill and labor. So long as they shall not assume to restrain the liberty and rights of others, no offence will be done. Let them use their liberty freely, but carefully abstain from infringing the liberty of others.

The associations of members of the legal and medical professions have been relied upon by the counsel for defendants, to justify their union. You must judge how far they are parallel. From the confidence reposed in lawyers, they have great power to do good or evil. The abuse of legal process is the worst species of oppression, as it assumes the guise of law. The object of the associations of the bar, in the different counties of this commonwealth, was in aid of the power, which was vested by law in the supreme judicial court, to regulate the admission of attorneys to practise, and to exclude immoral and unqualified persons from the profession. The several associations availed themselves of their right, to estimate the value of professional services. They refused to be concerned in cases, which were not instituted by attorneys, who were of regular standing in the profession. This was evidently beneficial to the community, and lessened litigation, and has tended, without doubt, greatly to elevate the members of the profession in the confidence and esteem of their fellow-citizens. You find, however, that after the revised statutes went into operation, the bar of this county

dissolved their association by their own consent; and now, although a portion of the members has formed a society for social and benevolent purposes, they have ceased, as a body, to enforce rules restraining the freedom of practice, or to interfere in any wise with the right of individual citizens to engage in the profession. The members of the medical profession in this city have formed a voluntary society, for mutual improvement in the healing art, and for social and benevolent purposes. They have rules regulating their professional practice and meetings, but do not undertake to impose fines or penalties. It is the intercourse of scholars and gentlemen, studious to promote each other's professional and moral welfare. They claim, likewise, to select their own companions, and to hold no fellowship with quacks. When the records of these associations were called for by the defendants, and laid before you, by consent, and without question of right, you will judge, if anything was discovered in them inconsistent with the rights of others, or injurious to the welfare of the community. I have made these remarks, although I think you were sensible, that the members of these professions were not accused of any offence, nor present to defend themselves, had their rights been invaded.

This case is as important in principle as any one which was ever tried in this court. I think, that we have all attended to it with diligence, and without prejudice. I am of opinion, and it is my duty to instruct you, as matter of law, that this society of journeymen bootmakers, thus organized for the purposes described in the indictment, is an unlawful conspiracy against the laws of this commonwealth. It is a new power in the state, unknown to its constitution and laws, and subversive of their equal spirit. If such associations should be organized and carried into operation through the varying grades, professions and pursuits of the people of this commonwealth, all industry and enterprise would be suspended, and all property would become insecure. It would involve in one common, fatal ruin, both laborer and employer, and the rich as well as the poor. It

Commonwealth v. Farley.

would tend directly to array them against each other, and to convulse the social system to its centre. Nothing but the force of government can put down a general spirit of misrule. But what could be hoped from the interference of government, when every citizen would be engaged in this civil strife? A frightful despotism would soon be erected on the ruins of this free and happy commonwealth. With these views of the nature and tendency of such private, voluntary associations, as the present, I cannot do otherwise than to instruct you, that if the evidence satisfies you, that these defendants, or any of them, have confederated together for the unlawful purposes which are charged in this indictment, you will, according to your oaths, find them guilty, and leave them to the judgment of the law.¹

The jury found the defendants guilty.

JUNE TERM, 1841.COMMONWEALTH *v.* JOSEPH FARLEY.

The Revised Statutes, of Massachusetts, c. 128, have not altered the offence of perjury at the common law; and in every case of perjury, materiality is still an element of the offence.

Where the materiality of the evidence is averred in an indictment for perjury, and there is nothing in the record of the case in which the evidence, for which the defendant was indicted, was given contradicting it, the indictment cannot be quashed for insufficiency.

Where A conveyed an estate to B, which had been previously mortgaged to C, and a judgment was recovered by C, under the mortgage, for the possession of the estate, and a petition for a review was afterwards filed by B, setting forth the discovery of new evidence, showing a technical payment of the debt secured by the mortgage, and A testified, at the hearing of the petition, that he notified B, at the time of such conveyance, of the existence of the mortgage; and A was afterwards indicted for perjury in so

¹ A bill of exceptions to the rulings of the court was tendered and allowed, and argued before the supreme judicial court, in March, 1841, and the judgment of the municipal court reversed. (*Vide* 4 Met. 112.)

Commonwealth v. Farley.

testifying, and a motion was made, before plea, to quash the indictment, by reason of the immateriality of such evidence to the main issue at the hearing; it was *held*, that such evidence was pertinent, if not material, and the motion was denied.

Where an indictment for perjury alleged that the defendant had conveyed an estate to B, which had been previously mortgaged to C; that C had recovered a judgment, under the mortgage, for the possession of the estate; that a petition for a review had been presented by B, by reason of newly discovered evidence to show a technical payment of the debt secured by the mortgage; and that the defendant was guilty of perjury in testifying, at the hearing of the petition, that he had informed B, at the time of the conveyance, of the existence of the mortgage; and the record of the proceedings at the hearing, offered in evidence at the trial, set forth, that the petition was for a review of a judgment "for the possession of the petitioner's mill-site and mills," whereas the indictment alleged that the judgment was "for possession of the land, mill-site and mills of B;" and the record also set forth, that the petition was "for a review of a certain action and *supersedeas* and stay of execution," but the indictment alleged, that the petition was "for a review of a certain action and judgment;" it was *held*, that as the indictment did not recite the record, such variances were no ground for the rejection of the testimony.

Held, also, that although the indictment alleged, that the hearing was on the third day of April, before three of the justices of the supreme judicial court, when the record set forth that it was on the tenth day of April, before the supreme judicial court, the record was admissible.

Held, also, that any of the proceedings set forth in said indictment, as having occurred at said hearing, and not set forth in the record, might be proved *aliunde*.

Held, also, that where the indictment set forth that the parties were "at issue" at the hearing — no issue having been then there joined — the words were to be taken in their popular signification.

Where A conveyed an estate to a manufacturing company, which had been previously mortgaged to C, and a judgment was recovered by C, under the mortgage, for the possession of the estate, and a petition for a review was afterwards filed by the company, at the hearing of which, A testified, that he notified the company, at the time of such conveyance, of the existence of the mortgage, and was afterwards indicted for perjury in giving such testimony, and upon his trial, when the debt which was secured by the mortgage, was still unpaid by the company, a stockholder of the company, who had been instrumental in procuring the indictment against A, was offered as a witness; it was *held*, that the interest of such witness went to his credibility, and not to his competency.

Commonwealth v. Farley.

Held, also, that a question to the following effect : Did A, while upon the witness-stand, say anything relative to an outstanding mortgage, made by him to C upon the lands where the mill of the company stands, and concerning his telling H. and O. anything relating to it ; if yea, what ? was proper.

Held, also, that a question to a witness, inquiring whether A, in his testimony, assigned any reason why the mortgage was not mentioned by him in his deed to the company, was proper.

In the trial of an indictment for perjury, in testimony given in court, a witness who heard all but a small portion of such testimony, was *held* to be competent.

At the February term of the court, A. D. 1841, an indictment was returned against the defendant for the crime of perjury, committed at the hearing of a petition for a review of an action before the supreme judicial court, in Suffolk, in March, 1840. An indictment for the like offence, founded on the same complaint, was returned at the January term preceding ; which was dismissed, upon the motion of the attorney of the commonwealth, when the second indictment was returned and filed. At the March term, before any plea was offered by the defendant, a motion was made by his counsel to quash the indictment ; which motion was argued by them fully, on the 13th day of April following, and by the attorney for the commonwealth. The argument rested very much on the materiality of the false evidence, as set forth in the indictment, compared with the record of the proceedings in the supreme judicial court, which was read by the counsel for the defence, the counsel on both sides consenting ; and he contended, that the evidence could not, in any view of it, be material. The attorney for the commonwealth replied, that by the Revised Statutes, (c. 128, s. 2,) the materiality to the issue of the evidence, had ceased to be essential ; all that was now required to constitute the offence by the revised statutes, being, that the perjury must be "in some matter or thing, respecting which such oath is required ;" and that perjury was now, in this commonwealth, a statute offence only, and not at the common law. If the court,

however, should be of a different opinion, he insisted, that the materiality of the evidence was clearly averred, and sufficiently apparent upon the record. But the counsel for the defence denied, that the statute had altered the offence, at common law, or that the legislature had intended to alter it. They contended, that the perjury should be material and relevant to the matter in issue. If the matter here sworn was, in the judgment of the court, immaterial and irrelevant, not only must the defendant, if put on trial, be acquitted, but, if the irrelevancy and immateriality appeared upon the record, or was shown to the court, the indictment should be quashed. *Rex v. Dunston*, (Ry. & M. 109.) They further argued, that the materiality of the alleged perjury, in this case, did not sufficiently appear, and therefore that the motion should prevail. *Rex v. Nicholl*, (1 Barn. & Adol. 21.)

Parker, for the commonwealth.

Fletcher and Bartlett, for the defendant.

THACHER, J., after taking time to consider the motion, pronounced the following opinion, on the 26th day of April. — The defendant is charged, in this indictment, with the crime of perjury. He has appeared, and, having first protested his entire innocence of the accusation, has moved the court to quash the indictment, for the cause, “that the matter alleged therein as untrue was wholly immaterial to the issue and proceedings before the supreme judicial court, in which the offence is alleged to have been committed, and that the same cannot be assigned as the ground of an accusation of perjury.” To quash an indictment, in which the party is accused of a judicial perjury, is a high act of power; because it is to discharge him without a trial or hearing of the facts, from an enormous accusation, made against him by the people of the commonwealth. It is true, that such proceeding is not a bar to a subsequent indictment for the same offence; and yet it will rarely happen, that a new indictment will follow. To authorize such a proceeding,

Commonwealth v. Farley.

the defect must be apparent on the record, and clearly perceived by any one who possesses a plain judicial understanding. Certainly, in determining such a question, we must not resort to refinements or legal subtleties. In addition to what appears on the face of the indictment, the parties have presented a copy of the proceedings in the supreme judicial court, to enable this court to judge of the materiality of the testimony, which is alleged to have been false, and both parties have invoked the expression of the opinion of this court on that point. Waiving all considerations of expediency, and conceding, as the parties agree, that the court has a perfect right to quash the indictment, for good and sufficient cause, I will proceed to examine the grounds of the motion.

The learned counsel for the defendant have insisted, that the materiality of the evidence must appear upon the record ; and that, if it does not so appear, on inspection, the indictment is defective in substance, and ought to be quashed. But in reply to this, it has been contended in argument, by the attorney for the commonwealth, that perjury is now, in this state, a statute offence only ; that it is no longer one at the common law ; and that the materiality of the testimony complained of, is no longer one of its elements. This leads us first to inquire, What is perjury at the common law, or judicial perjury, as it may not improperly be called ? " Perjury, at the common law," says Hawkins, " seemeth to be a wilful false oath, by one who, being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not." (1 Hawk. P. C. 318, c. 69, s. 3.) " All such false oaths as are taken before those who are any ways intrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries." " Therefore, it hath been holden, that not only such persons are indictable for perjury, who take a false oath in a court of record, upon an issue therein joined, but also all those who for-

swear themselves in a matter judicially depending before any court of equity, or any other lawful court, whether the proceedings therein be of record or not. — It seemeth, also, that any false oath is punishable, as perjury, which tends to mislead the court in any of their proceedings relating to a matter judicially before them, though it no way affect the principal judgment which is to be given in the cause.” (Ib.) “There is a great distinction between an oath of a mere private matter, on the conclusion of a bargain, for instance, however wilful or malicious such false oath may be, and one taken in a course of judicial proceeding. The former is not indictable as perjury; but the latter derives its malignancy from the place and the occasion; which is a solemn hearing or trial before a court of justice, where truth is the great object to be attained, that the judges may apply to it with certainty the decisions of law. But if the falsity in the matter be wholly foreign to the point in question, or altogether immaterial and not pertinent to it, neither aggravating nor extenuating, nor likely to give a readier credit to the substantial part of the evidence, it is not perjury, because it is idle and insignificant.” (Ib.) In the case of *Rex v. Griepe*, (1 Ld. Raym. 256,) the court say, “it seems to be a clear point, in which all the cases agree, that though a man swear falsely, yet if it be in a matter immaterial to the issue, it will not amount to corrupt perjury; for, the reason that perjury is so high a crime, is, in respect of the injury that it does to a man; but if it is not material to the issue, it cannot, by any means, induce the jury to give their verdict one way or another, and consequently, cannot injure the party against whom the verdict is given.” Now, an oath is wilful, when taken with deliberation, and not through surprise or inadvertency, or a mistake of the true state of the question. *Commonwealth v. Cornish*, (6 Binn. 249.) And the false oath amounts to perjury, if it has any tendency to prove or disprove the matter in issue, although but circumstantially. (3 Starkie on Ev. 1144, art. *Perjury*; see note 1.) Ld. C. J. Holt, expressing

Commonwealth v. Farley.

the opinion of the court of king's bench, in a case of perjury, said, "it is not necessary, that the evidence be sufficient for the plaintiff to recover upon; it is enough if it be circumstantial evidence. And in the nature of the thing, an evidence may be very material, and yet it may not be full enough to prove directly the point in question. And it is always sufficient, in indictments of perjury, to say, that the defendant swore so and so, *de materia in exitu*;" and, he adds, that it had always been held so in his time. *Regina v. Rhodes*, (2 Ld. Raym. 886.)

This is perjury as it exists at common law, clear in its definition and elements, humane and worthy of that benignant system to which it belongs. Have the revised statutes altered this offence in any of its elements, when committed in this commonwealth, in any proceeding in a course of justice? The first section of the 128th chapter of the revised statutes is in these words: "Every person who being lawfully required to depose the truth in any proceeding in a course of justice, shall commit perjury, shall be punished, if such perjury was committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life, or any term of years, and if committed in any other case, by imprisonment in the state prison not more than twenty years." What perjury is, is not defined by this section. For that, we must still resort to the common law; unless it is to be found in the second section, which is as follows: "If any person of whom an oath shall be required by law, shall wilfully swear falsely in regard to any matter or thing, respecting which such oath is required, such person shall be deemed guilty of perjury." This extends the offence to other cases, I think, without altering or defining the nature of judicial perjury. The first section clearly points to the common law offence; the second comprehends every act of wilful false swearing in regard to any matter or thing, which the person is required by any statute to verify on oath, whether in court or out. This second section is a revision of the act of 1830, c. 56,

which is in these words, namely : " That if any person of whom an oath is required by the provisions of the acts incorporating any bank, manufactory, or other incorporation, or by any general law of this commonwealth, shall wilfully and falsely swear or affirm in regard to any matter or thing respecting which such oath is required to be made, such person shall be deemed guilty of perjury." This statute defines a distinct species of perjury, where a person shall wilfully swear falsely in regard to any matter or thing, respecting which such oath is required. Prior to this act, false swearing in such matter would have been punishable as a misdemeanor ; but it did not come within the definition of perjury at common law, *committed in a proceeding in a course of justice* ; nor could it be punished for that offence under any statute of this commonwealth. I am therefore of the opinion, that the revised statutes have not repealed or altered the crime of perjury, as it is defined at the common law ; and that in all judicial oaths, materiality is still an element of the offence : in all other cases of perjury, the false swearing must be in a matter required by some express law of the commonwealth.

The attorney for the commonwealth perceiving that the court might come to this conclusion, has urged, in his argument, that if materiality is still to be regarded as an element of judicial perjury, the evidence of Joseph Farley, in this case, was material, as is, in fact, expressly averred in every count of this indictment. This makes it necessary, therefore, to consider that point. And for the purposes of this preliminary hearing, all the allegations in the indictment must be presumed to be true. It seems that Jonathan Story, as executor of the last will of Elizabeth Cogswell, recovered judgment against the Ipswich Manufacturing Company, at the November term of the supreme judicial court in Essex, in the year 1839, for possession of the lands, mills, &c. of that company, situated in the town of Ipswich, in the county of Essex, upon a mortgage made by Joseph Farley, the defendant, to one Jonathan Cogswell, on the

5th day of December, 1801. And it is set forth in the four first counts of the indictment, that at the term of that court, in March, 1840, holden in the county of Suffolk, the company presented a petition for a writ of review of that action and judgment; that after due notice to said Jonathan Story, the parties, on the 3d day of April, 1840, were heard on that petition before the court; that the parties were at issue upon several material questions of fact; that it was a material question and matter of fact whether Joseph Farley did notify and tell Francis J. Oliver and George W. Heard, before and at the time when he sold the estate to that company, that it was subject to the incumbrance of that old mortgage; and that the said Farley did testify, at that hearing, that he told the said Oliver and Heard, when he so sold and conveyed said estate to the company, that that mortgage by him made to said Jonathan Cogswell, was an existing incumbrance on it, and that the estate was subject to the mortgage; which evidence, it is alleged, was wilfully false; inasmuch as in truth and in fact, he did never notify or tell the said Oliver and Heard that the estate was subject to any incumbrance whatever. I am not aware that it is necessary that the indictment should set forth all the proceedings so as to show how this question became material. The averment of materiality is deemed to be sufficient, and is matter of proof at the trial; and unless the prosecutor shall show, at the trial, the materiality of the question and evidence, no conviction can take place.

In the other counts of the indictment, the alleged perjury is set forth somewhat differently, although with no substantial variance, but to meet the evidence at the trial; and it is further alleged, that Oliver and Heard acted as the agents of the company in making this purchase. To authorize the court to quash an indictment, it must be clearly defective in the description of the offence, so that if the proof should even sustain the allegations, no judgment could, for that cause be rendered against the defendant. The fact of materiality is alleged in this case.

Nothing contradictory to it appears on the record. It is susceptible of proof, will constitute the ground of conflict between the parties at any future trial, and will be settled by the verdict of the jury. The case of *Rex v. Dunstan*, (Ry. & M.109,) which was relied upon by the defendant's counsel in their argument, was a trial at nisi prius before Ld. C. J. Abbott, for perjury alleged to have been committed in an answer to a bill filed against the defendant, in the court of chancery. The question was, whether the denial of an agreement which, by the statute of frauds, was not binding upon the parties, was material. The chief justice was of opinion, that it was utterly immaterial. It was necessary, he said, that the matter sworn to, and said to be false, should be material and relevant to the matter in issue; and as the matter sworn in that case was, in his judgment, immaterial and irrelevant, the defendant was acquitted by a verdict of not guilty.

Thus it appears, in this case, that the materiality of the evidence was a question of fact at the trial, and that the jury were instructed by the court, that the fact sworn to and complained of was immaterial and irrelevant, and therefore that the defendant was acquitted. But in the case of *The King v. Nicholl*, (1 Barn. & Adol. 21,) in which a verdict had been rendered on the trial, at nisi prius, against the defendant, error was brought in the court of King's Bench to reverse the judgment for the alleged insufficiency of the indictment; and inasmuch as the materiality of the evidence complained of did not sufficiently appear on the indictment, the judgment was reversed. Bailey, J. said, that an indictment must be good without the help of argument or inference. In the case of perjury, the indictment must show, either by a statement of the proceedings, or by other averments, that the question to which the offence related was material. Park, J. said, "It is part of the definition of perjury, that the false swearing is on some point material to the question in issue. In an indictment, this may appear either from the matter of the suit, as shown on the

Commonwealth v. Farley.

record, or by direct averment. Here it must be collected, if at all, from the latter. There is no averment of materiality in that part of the indictment which sets out the evidence."

Now, in the case against the defendant, the materiality of the evidence is directly averred in every count of the indictment, and nothing on the record contradicts that averment. It is my opinion, therefore, that the indictment is sufficient, and that it cannot be quashed for insufficiency. The defendant, being desirous to obtain from the court an expression of opinion on the materiality of the evidence complained of, and having had over of the record of the petition and proceedings in the supreme judicial court, his counsel have insisted in argument, that it is apparent from these, that the evidence was not material to the question in issue. The court is not bound, I think, to give an opinion on this point, before a final hearing of the case at the trial; but as both parties have expressed such to be their desire, I will consider it. As such opinion, however, must arise merely on the evidence of the record, and consequently on a partial hearing of the merits, I shall not feel bound by it, if the case should ever hereafter, at the trial, appear under a different aspect. The prayer of the petition to the supreme judicial court was, "for a review of the action and for a *superseas* and stay of the execution, — because, since the judgment was rendered, namely, on the 25th day of February, 1840, the petitioners had discovered that the debt secured by the mortgage was paid many years since, and long before said suit was brought, as appeared by inspection of papers in the probate office, and other evidence to be exhibited, as the petitioners were advised and instructed in point of law, and as they fully believed; of the existence of which evidence they had no knowledge and were wholly ignorant, until after said judgment, which they say, was recovered by accident and mistake."

The counsel for the defendant say, that the supreme judicial court would confine the petitioners and parties to the ground stated in the petition, which was the fact of payment; and that

the testimony of the defendant was not pertinent and material to that point, and that it could have no influence upon that court in making their decision. A petition for a review of an action, and to stay the execution which has issued on a judgment, is addressed to the discretionary power of the court, and is to be granted by them, if they shall deem it to be reasonable," and "upon such terms and conditions as they shall think fit." (Act of 1791, c. 17, s. 2: Rev. St. c. 99, s. 18 and 19.) They may inquire into every circumstance which can enlighten their discretion, and the petition may be granted in whole or in part. They may grant the review without staying the execution, or they may decree both without requiring security. The judgment in this case was upon an old mortgage, on which judgment had been rendered against the petitioners, in the same court, sitting in another county. So much respect would reasonably be paid to a judgment, rendered under such circumstances, that the court might well presume, that the debt had not been paid, but that it was still due to the respondent; and although they might, upon the discovery of new evidence, have deemed it reasonable to grant the review, they might still have thought it not proper to grant the *supersedeas*. Suits on mortgages, whether for redemption or foreclosure, partake of equity as well as law; and it might well have been deemed inequitable by the court to allow further delay of payment of a mortgage which had already been running for nearly forty years. It was apparent, too, that the petitioners did not expect to prove payment of the debt by showing that the bond was cancelled, or the note given up, or that there was any discharge upon record. They expected to prove a technical payment from "the inspection of papers in the probate office, and by other evidence to be exhibited, as the petitioners were advised and instructed in point of law." The evidence might amount to proof of an actual payment, as would be shown on a new trial. But before the respondent would be required to produce any evidence on his part, the petitioners would, undoubtedly,

Commonwealth v. Farley.

be required to exhibit their newly discovered testimony. Now, if it was rendered probable only, by the newly discovered evidence, that the debt had been paid, and not certain, the supreme judicial court would, I think, according to their practice, have deemed it reasonable to give to the parties a new chance to try the fact of payment.

Joseph Farley was called and sworn as a witness for the respondent. The circumstances seem to preclude all surprise or inadvertency, and all accident or mistake on his part; for he was called to testify to a conveyance in which he was the grantor, where he had received the loan of a large sum of money, for which he had pledged the estate by mortgage. He had made and executed the mortgage to Jonathan Cogswell, and he had sold and conveyed the estate to the Ipswich Manufacturing Company. If any one knew the fact, he must have known whether the debt, to secure which the mortgage was given, had been paid. From the relations which had existed between him and the company, it might well have been presumed, that he would speak the truth of the matter. Certainly, the court could not have presumed or believed that he would testify to a wilful and corrupt falsehood. He testified, "that he told Messrs. Heard & Oliver, when he sold to them, that this old mortgage was upon the property; and that at or before or after a meeting in 1831, he stated to said Heard & Oliver, that there was a mortgage on his property, and that he wanted to clear it, and desired them to minute it; and that the reason why it was not excepted in the deed to the company was, because it was perfectly understood, as he supposed, that the said mortgage was an existing incumbrance on said estate and premises." If the court had believed this testimony, it was calculated to have an effect on their discretion. To the petitioners they might have said — "you aver that you have discovered papers in the probate office, from which your counsel advise that it may be inferred that the debt is paid. But, in opposition to this fact, the party who made the mortgage and who

also conveyed the estate to you, now testifies, that he informed your agents, prior to the sale and conveyance, that the mortgage was subsisting, and that he wanted to have it paid. There must be some mistake in this matter. We will give you an opportunity to investigate it, by granting a review of the action ; and we will allow a *supersedeas* to the execution, on your giving a bond with security to this respondent, to pay the debt to him, if the judgment shall finally be rendered in his favor." Upon the trial of the review, the material question would be, whether the debt was paid. What was said by the defendant, relative to the continued existence of that mortgage, prior to the sale and conveyance of the estate to the company, would or might be at the trial perfectly irrelevant. But at the hearing of the question on the petition for the review, the statements of the defendant on this subject, at that time, were pertinent, if not material. The court did not reject the testimony as irrelevant, nor does it now appear that an objection was made to its introduction. In deciding upon the petition, and upon the terms and conditions on which the review should be granted, the discretion of the court could not fail to have been influenced by the fact, that this old mortgage was an existing incumbrance on the property, and that the company knew, prior to their purchase, that the debt was not paid.

For these reasons I am not prepared to say, that the evidence complained of was irrelevant and immaterial to the matter, which was then pending before the court in a course of law. Its materiality remains to be settled by the verdict of the jury. They are the constitutional and legal judges of the matter, and to them the whole subject will be fresh. It would be an act of usurpation in this court to presume, under the circumstances, to take the case from their cognizance. It will be tried without prejudice, notwithstanding the court has yielded to the wishes of both parties, so far as to intimate an opinion on a partial hearing of the evidence respecting the materiality of the evidence — I say, without prejudice, so far as we can exercise our

/

judgment impartially under such circumstances. The motion to quash the indictment, is therefore, denied; and it is the order of the court, that the defendant be required to plead to the indictment; and that a jury be impaneled, at a convenient time, to try the issue.

After this opinion had been pronounced, the defendant pleaded not guilty to the indictment, and the trial came on by assignment, on Monday, the 28th day of June following.

Parker then opened the prosecution. He said, that the material falsehood complained of against the defendant, was, that in a hearing before the supreme judicial court, he had sworn that he gave express notice of the existence of a certain mortgage to Francis J. Oliver and George W. Heard, acting as agents to the Ipswich Manufacturing Company, at and before the conveyance by him to that company, of certain real estate and water privileges, on which they had since built a manufactory. He then proceeded to the evidence.

To the reading of a certified copy of the record of the proceedings in the supreme judicial court, which was the first piece of evidence offered by the government, *Bartlett* objected, on the ground of variance between that certified record and the indictment. These proceedings were, he said, upon the hearing of a petition, presented by the Ipswich Manufacturing Company, for the review of an action, in which judgment had been rendered against that corporation, at the Essex term of the supreme judicial court, in November, 1839, for possession of the mortgaged premises, in favor of Jonathan Story, executor of the last will of Elizabeth Cogswell. His objections were as follow : 1. In the indictment it is set forth, that the judgment was "for possession of the land, mill site and mills of the said Ipswich Manufacturing Company." But the certified copy of the record offered says, that the petition was for the review of a judgment "for the possession of the petitioners' mill site and mills." This objection applied to the four first counts in the indictment. The expression in the indictment is "lands and mills,"

in the plural number ; but the certified record says, " mill site and mills " only. 2. In the four first counts of the indictment, it is alleged, that an issue was joined between the parties ; whereas it did not appear, from the certified record, that any issue was joined ; and, in fact, no issue was joined. 3. The indictment sets forth, in every count, that the petition was " for a review of a certain action and judgment ; " but the certified copy says, that the petition was " for a review of a certain action, and *supersedes* and stay of execution." The counsel insisted, that there was no such thing as the review of a judgment. The revised statutes speak only of the review of an action. 4. The indictment says, in every count, that the hearing in the supreme judicial court, was on the 3d day of April, and that it was before the chief justice, and Putnam and Wilde, justices. But the certified record contains no statement of that fact, nor is it alleged in the indictment under a *videlicet*. If it should be said that the time is not material, the averment has made it material, and it must therefore be proved. He objected also, that the certified record was not evidence under the four last counts of the indictment. These severally allege, that a certain petition was pending in the supreme judicial court, for the review of a judgment, rendered in favor of Jonathan Story, executor, against the Ipswich Manufacturing Company, and came on to be tried. There is no averment what the judgment was for, nor are the proceedings set forth. In this respect, these counts differ from the four first. *Bartlett* said further that it would be necessary, in case a verdict should be rendered against the defendant, to examine, whether the act of 22 Geo. II. c. 11, had been adopted in practice in this commonwealth. Until that statute was passed, it was necessary, in indictments for perjury, at common law, to set out at length the record of the proceedings, in which the perjury was alleged to have been committed. He also took divers exceptions here to the sufficiency of the indictment, both as to the form and substance. But, on the suggestion of the court, these were re-

served for subsequent consideration and examination, if it should be necessary.

Fletcher, in support of the exceptions taken by his colleague, contended, that the certified record was not of such a trial as was set forth in any of the counts in the indictment, and that the government was held to strict proof, that the perjury was committed, if at all, at the hearing of such a case as was described in the indictment. He argued, that the trial set forth in the certified record was not the same as that in the indictment, because the judgment was not rendered on the 3d day of April, but on the thirty-third day of the term, which was the tenth day of that month. Nor could this be avoided, by the explanation of the attorney for the commonwealth, that the record was evidence of the judgment and of the date of that judgment, but not of the time of the hearing and trial, which was on the 3d day of April. There was therefore a clear and palpable variance between the record and the indictment, which was applicable to each of the counts; and therefore, the evidence offered was not admissible under any of them. As to the third objection, the indictment purports that the petition was pending, "as for a review of a certain action and judgment." But the certified record shows, that the petition was for "a review of an action only." The indictment being recital, it must be a perfectly accurate recital. In setting forth a written paper, the variation in the recital of a word is fatal. This variation is matter of substance; because the review of an action is substantially different from the review of a judgment. *Rex v. Spencer*, (Ry. & M. 97); *Rex v. Schoole*, (Peake's Ca. at N. P. 112); *Rex v. Eden*, (1 Esp. 97.) The indictment sets forth, in all the counts, that the trial was before three of the justices of the court. It was not necessary, to allege more than that it was before the supreme judicial court. The certified record shows, that the trial was before the supreme judicial court. This imports, that it was before all the justices, consisting at that time of four in number. Who were present, and which was absent?

As to the variance between the four first counts and the certified record, the indictment alleges, that the judgment to be reviewed, was "for the lands, mill site and mills;" but the certified copy is "for the mill site and mills only." These are not identical. The addition of *lands* may mean, and probably refers to other lands of the company. The indictment says, in all the counts, that the parties were at *issue*. If the term *issue* is to be taken technically, this is a fatal variance; but if it is to be taken, as the attorney for the commonwealth contends, in a popular signification, it may be different. The counsel insisted, that it here had a technical sense, and that as in the proceedings before the supreme judicial court, there was no plea, no joining an issue and denial, therefore, the parties did not come to any issue in the sense of the law. *Rex v. Jones*, (Peake's Ca. N. P. 37.)

Parker insisted, that the paper, offered as the certified record of the proceedings of the supreme judicial court, ought to be read; and he replied to the objections of the defendant's counsel, at length.

THACHER, J. The defendant is charged, in this indictment, with the crime of perjury. It is set forth in eight counts, each of which, in legal contemplation, constitutes a distinct charge. But it is not pretended, that more than one offence has been committed, if any. From the uncertainty which attends every trial, and to meet the evidence in whatever form the perjury may appear, the offence is charged to have been committed in different ways. The evidence may apply to one or more of the counts, and not to the others. But if it applies to any one of them, it is competent, and cannot be rejected. To the first piece of evidence produced by the government, in support of the prosecution, numerous objections have been made by the defendant's counsel, and supported by learned argument and weighty authority. To decide intelligently on the competency and pertinency of the evidence, we must look to the indictment, and see if this certified record tends to prove the issue in whole

or in part, under any of the counts. The perjury is alleged, in the indictment, to have been committed at the term of the supreme judicial court, holden in the county of Suffolk, in March, 1840, before Shaw, Ch. J., and Putnam and Wilde, justices. It was at the hearing of a petition for a writ of review of a certain action and judgment obtained by Jonathan Story, executor of Elizabeth Cogswell's last will and testament, against the Ipswich Manufacturing Company, at the November term of the supreme judicial court, in the county of Essex, in 1839. The judgment was for possession of the lands, mill site and mills of said Ipswich Manufacturing Company, upon a mortgage purporting to be made by Joseph Farley to Jonathan Cogswell, on the 5th day of December, 1801. The Ipswich Manufacturing Company were the petitioners, and said Jonathan Story was the respondent. The indictment set forth, that this petition was duly entered and presented to the court on the 9th day of March, 1840, and that after due notice had been given to the respondent, it came on to be heard there on the 3d day of April following, in due form of law. Upon the hearing, the said parties, being at issue upon several material questions of fact, the said Joseph Farley was, on the 3d day of April, called and offered as a witness for and in behalf of said Story, the respondent, in the matter then in hearing, and was sworn and testified, and it is for matter stated by him, in testifying at that time, that he is now on trial for this alleged perjury.

In the four first counts of the indictments, the proceedings preliminary to the allegation of the false testimony, are introduced in this way. But in the four remaining counts, a different course is pursued. These say, that at the court so held and described, on the first Tuesday of March, 1840, a certain petition for a review and *supersedeas* of the judgment afore described, was there pending, and came on to be heard in due course of law, and at the hearing, on the 3d day of April, 1840, Joseph Farley was produced and sworn as a witness, in behalf of the respondent, in the matter then and there in hearing, and

being duly sworn, testified on his oath. There is no description of the judgment or mortgage. The question is not at this time on the sufficiency of the indictment, in matter of form or substance ; but is confined to the admissibility of the testimony. This paper is a certified record, briefly stating the proceedings in the supreme judicial court. It shows that, at the term mentioned, a petition was presented by the Ipswich Manufacturing Company, setting forth the judgment recovered in the county of Essex, "for possession of the petitioners' mill site and mill," upon such mortgage, that the plaintiff, Story, the executor, had taken out an execution thereon, and had given notice of his intention to enter under it ; and praying for a review of the said action, and for a *supersedeas* and stay of the execution for the reason there in said petition contained. The certified record goes on to say, that the said petition was filed on the 9th day of March, that an order was given for notice to Jonathan Story, to appear on the 16th day of March, to show cause why the prayer should not be granted ; and that, on the thirty-third day of the term, it being made to appear, that said order had been complied with, and both parties appearing and being fully heard, it was ordered by the court, that a writ of review issue, as prayed for in the petition.

The record of a court is the highest evidence known in law, and cannot be contradicted. If a party in a suit, civil or criminal, undertakes to recite the tenor of a record, which must be *in totidem verbis*, the omission or alteration of a single word, so as to make it to mean something different from the original, is fatal, and it cannot for that cause be read in evidence. But there must be an express recital, and a reference to the original, as remaining of record. On inspection of this indictment, I do not find, that the government undertakes, in any one of the counts, to set forth and recite this record according to its tenor. The government was not held to a literal recital, and it is not a case in which evidence is to be excluded for a variance. If the paper proves, or tends to prove, any fact alleged in the indict-

Commonwealth v. Farley.

ment, and material to be shown, it is competent for either party to read it to the jury. Now, this certified record shows that, at the March term of the supreme judicial court, in Suffolk, 1840, a petition was presented by the Ipswich Manufacturing Company, for a writ of review of the action, wherein Jonathan Story, in his capacity of executor to the last will of Elizabeth Cogswell, had recovered a judgment against that corporation, at the Essex term of that court, in November, 1839; that an order was issued to Jonathan Story; that there was a hearing of the parties; and that the review prayed for was granted. These facts are alleged, and must be proved under every count of this indictment; and they can be proved only by this record; because it is the highest and best evidence of their truth. But these facts alone, although proved by the highest testimony, may be very far from establishing all the facts necessary to convict the defendant of his alleged offence. Every fact properly alleged, in the indictment, must be proved, if it is material in any wise to establish the alleged guilt. Therefore, it will be competent to prove, by other records, if they exist, or by other inferior testimony, if there is no record of the fact, what justices held the court at the time, and whether it was a competent tribunal, to hear and adjudicate upon the petition. It may be necessary and proper to exhibit the original petition, in evidence, and to show the judgment which was rendered in the county of Essex. I know of no objection, at present, to supply, by other evidence, any facts not contained in this certified record, which is but one link in the chain, to prove everything which occurred at the hearing before the supreme judicial court, which may have a material bearing on this accusation.

I cannot reject this certified record, on the objection as to the time of the hearing. In all the counts, it is said, that the time alleged, was the 3d day of April; but the certified record shows, that the hearing, as well as the judgment or decree, were on the thirty-third day of the term, which was the 10th day of April, so that it is inferred by the defendant's counsel, that the

variance is palpable and clear. But it appears to me, that the time alleged in the indictment may be reconciled with that set forth in the record, without any violence to good sense, or the force of language. A time must be assigned for the commission of the offence, and it is alleged to be on the 3d day of April. All the authorities agree, that the offence may be proved to have been committed on a day different from that alleged in the indictment. If so, it may be shown, that the hearing was on one day, when the perjury was committed, and that this day was different from that on which the judgment of the court was rendered. All, therefore, that I infer from the conclusion of the certified record is, that it appearing, that the order had been complied with, that the parties had appeared, and that they had been fully heard; it was therefore, considered and ordered by the court, on this thirty-third day of the term, that a writ of review should issue. The certified record cannot be excluded, because it says, that the petition was for a review of the "action," merely, although in the counts of the indictment it is said, that it was for a review of the "action and judgment." On the supposition, that the recital must be perfectly accurate, it is contended, that this is a substantial variance. I think it is not creditable in the administration of justice, in civil or criminal cases, to yield to nice verbal refinements. Our Revised Statutes, (c. 99, s. 1,) provide, "that final judgments, in civil actions, may be reëxamined and tried anew, upon writs of review, under the circumstances and in the manner provided in that chapter, and not otherwise." The granting of a review is the allowance of a writ to reëxamine and try anew a judgment that is final in its nature, as was the judgment rendered in this case, by the supreme judicial court, in the county of Essex. As therefore, the record shows that the petition was for a review of an action, and the indictment alleges, that it was for a review of a certain action and judgment, it brings it within the true intent and meaning of the statute. It would be, I think, an unreasonable refinement to reject the document for this cause.

The defect of the record, in not setting forth the names of the justices, at the hearing of this petition, may, I think, be supplied by other competent evidence of that fact ; but the record is evidence of this fact so far as it extends. It shows, that the hearing was before a competent and legal tribunal. I take the term *issue*, as used in the counts of the indictment, in its popular signification, rather than in any technical sense. The conflict between the parties, was upon the application for granting a review. The petitioners prayed for it ; the respondent opposed it ; and evidence was examined on both sides, which constituted the issue at the trial and hearing. There was no formal plea or written answer to the prayer of the petition. The parties understood it. Had the court required a written plea, it might have been framed ; but as it was not usual in practice, none was ordered by the court. The variance in relation to the different descriptions of the object of the petition, as stated in the indictment and record, has, I confess, more weight on my mind than any other objection, which has been raised in the case. But I shall overrule this also, on the ground, that the government has not undertaken, and therefore, is not bound to make an exact recital of the certified record ; and therefore, it is permitted to be read in evidence.

The certified record was then read by the attorney for the commonwealth to the jury. After which, *Thomas Lord* was called and sworn as a witness for the prosecution. It appeared, on a preliminary examination of this witness, that he was a stockholder in the Ipswich Manufacturing Company, and had been instrumental in getting this prosecution before the grand jury, and that the debt for which the mortgage was made by Joseph Farley, as security, still hung over the corporation, and was unpaid. *Bartlett*, contended that these facts showed that the defendant had an immediate interest in the event, which rendered him an incompetent witness, and that he ought therefore to be excluded. It further appeared, that civil actions were pending between the defendant and the company ; and also,

between persons claiming under the grants of the defendant and the company; and that it must be an object to fix upon the defendant the conviction of perjury, in order to disqualify him as a witness from testifying in any of these cases. The counsel for the defence relied upon the authority of *Rex v. Hulme*, (1 Car. & Payne's Ca. at N. P. 8.) . But this objection was overruled, on the ground, that it went to his credibility, and not to his competency, as a witness. On a further inquiry by defendant's counsel, the witness said that he was present at the whole hearing of the case, on the 3d day of April, before the supreme judicial court; excepting that while the defendant was on the stand, he, the witness, left the court for a few minutes, but that he found him still upon the stand, under examination, at his return. The defendant's counsel objected to the examination of the witness, contending that he was an incompetent witness, because he did not hear the whole of defendant's testimony at that time. During the absence of the witness, the defendant might have qualified the exceptionable part of his testimony, which would completely exonerate him from the imputation of swearing falsely. They relied on the cases of *Rex v. Jones*, (Peake's Ca. N. P. 37,) and *Rex v. Dowlin*, (Ib. 170.)

THACHER, J. All objections of this character now go to the credibility of the witness. The fact, that the witness did not hear, or would not undertake to say, that he recollected the whole testimony, is matter of comment, and proper for the consideration of the jury. The evidence of the witness is good *prima facie*; especially, as it does not preclude the defendant from proving by other witnesses, that he did, in fact, explain, or qualify, or entirely retract his first testimony. *Rex v. Rowley*, (Ryan & M. 299); Roscoe's Crim. Ev. 680.

The following question by the attorney for the commonwealth, was objected to: "Did Joseph Farley, while upon the witness-stand, say anything relative to an outstanding mortgage, made by him to Jonathan Cogswell, in the year 1801, upon the lands

Commonwealth v. Farley.

in Ipswich, where the mill of the Ipswich Manufacturing Company stands, and concerning his telling Messrs. Heard and Oliver anything relating to it? If yea, what did he say on this subject?" The objection was overruled. The witness then answered, that the defendant testified, that he told Messrs. Heard and Oliver, when he sold to them, that this old mortgage was on the property; and that the reason why he did not mention this mortgage in the conveyance of the estate to the company, was, because everybody knew it was on the property. This testimony was in relation to the mortgage deed from him to Jonathan Cogswell, in 1801. Witness said that the defendant never qualified that testimony in his hearing, or to his knowledge. Some observations were again made by the counsel of the defendant, on the admissibility of this testimony, arising from the fact, that the witness was absent from the court, during part of the time that the defendant was under examination. But the evidence was deemed proper. "Where it has once been proved, that particular facts were positively and deliberately sworn to, by the defendant, in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony, he explained or qualified that which he had sworn to." (2 Stark. Ev. 625, 2d ed.) The witness was then subjected to a rigorous cross-examination as to the sources of his knowledge of facts in this case, to the share which he had taken in instituting the prosecution, and to his present interest in the management and property of the company.

Other witnesses were called for the prosecution. *Josiah Caldwell*, testified, that the defendant said, on his examination at the hearing, that he told Heard and Oliver, that the Cogswell mortgage was on the premises; but as to the time specified by the defendant, of making this declaration, this witness was not certain. He was asked, whether the defendant assigned any reason, why the mortgage was not mentioned by him in his deed to the company? This question was objected to by

the defendant's counsel ; but the objection was overruled. The witness then said, that the defendant replied, that he acted under the advice of counsel, and that he supposed, that it was not necessary to mention the deed, because the fact of its existence was notorious. He had no recollection that the defendant qualified or retracted any part of his testimony, in reference to the outstanding mortgage, or in any other particular.

Simon Greenleaf, was also examined as a witness for the prosecution, and said, that he acted as counsel for the petitioners, at the hearing before the supreme judicial court, and took minutes of the defendant's testimony ; that the defendant testified, that he, as executor of the last will of Jonathan Cogswell, assigned this mortgage to Elizabeth Cogswell, as part of her distributive share in the settlement of his estate, and that he continued to pay to her the interest which accrued upon the mortgage, until the year 1828, at which time he commenced his negotiations with Heard and Oliver for conveying the property, and forming the Ipswich Manufacturing Company ; that no interest was paid or demanded by any one on this mortgage, until 1837, when he had failed, and the debt was likely to fall upon the company from his insolvency and inability to pay it. The witness testified, that he would not say how far the defendant explained the mortgage to the petitioners ; but that the defendant did say, that *at or before or after* a meeting in 1831, he stated to Heard and Oliver, that there was a mortgage on his property, and that he desired them to minute it — a mortgage, which he wanted to clear up ; but that in January or February, 1839, long after his failure, a committee of the company was appointed to examine its affairs, at which he assisted, and Thomas Lord, as agent for the company, took minutes ; that he stated to them at that meeting, the existence of this mortgage, and that it had been assigned to Elizabeth Cogswell, and that at this time, the company considered the mortgage as good ; that in the year 1831, or at some time between 1829 and 1831, he told Mr. Heard, that this was an existing incumbrance. But

that he did not mention this mortgage in the conveyance to the company, which was not executed until 1836, because it was perfectly understood, as he supposed, at the time.

Francis J. Oliver and *George W. Heard* were then examined as witnesses for the prosecution. They testified that the defendant was president and agent of the company from its organization to 1837, and that he owned the original estate on which the manufactory was built, and conveyed it to the company. That they had an unlimited confidence in him, that they never examined the particulars of the title of the estate, which he conveyed to them, that they supposed it to be perfectly free from any incumbrance at the time of the conveyance, and this was their mutual understanding at the time. Oliver said, that the defendant never told him, at any time, of the existence of this mortgage; that he should certainly not have paid for his interest in the concern in cash had he known of the mortgage; and that it was a perfect surprise to him when he heard of it in 1837, which was long after the conveyance to the company, and nearly ten years after he was engaged with Farley in getting the manufactory into operation. Heard said, that he acted as an agent for his brother, Augustine Heard, in the arrangements for this company, and that his brother owned a fourth of the property; that the defendant never told him and Oliver, when they were together, of the existence of that mortgage; and that he never heard of it until the year 1837, or early in 1838; and that he was greatly surprised when he heard of it. Both these witnesses were put to a rigorous cross-examination as to all circumstances connected with their negotiations with the defendant relative to this conveyance. Both adhered to the fact, that the defendant had never given to them the slightest reason to suspect the existence of this old mortgage, or that it was an incumbrance on the corporate property. On their cross-examination, both these witnesses admitted that they had signed and sworn to a bill in chancery, pending between the company and the defendant, in which the

original agreement between them was stated to have been in writing, and to have been signed and sealed by the parties. Some time afterwards it was discovered that that agreement was not so signed and sealed by the parties. Both witnesses said, that they had supposed and believed at the time that the agreement had been so signed and sealed, as it had been acted upon by the parties as a valid agreement and binding on them ; and that they had put their names to the bill in confidence, that their attorney who had prepared it, had set forth the facts truly and as they were. They further said, that the error in their statement had been corrected since its discovery in an amended or supplemental bill.

On the part of the defendants several witnesses were sworn and examined, who were present at the hearing in the supreme judicial court, to contradict and invalidate the testimony for the prosecution. *Otis P. Lord, Nathaniel K. Lord, and I. P. Perkins*, all of whom had acted as counsel for Story, the respondent, and sometimes for the defendant, in various stages of the matters in controversy, had no recollection that the defendant was interrogated at the hearing respecting the old mortgage, or that he had said on the cross-examination, that he had given information to Oliver and Heard of its existence. It was material to show, that at the trial in Essex in November, 1839, the company had knowledge of the existence of the mortgage, and that they did not *then* contest its validity. But it was not a point at this hearing, that notice of its existence had been given to Heard at the time or long before the conveyance to the company.

Chief Justice Shaw testified, that he presided at the hearing in the supreme judicial court, and that he recollected that Justice Dewey was absent at the time ; that the hearing was on one day in April, and the judgment or decision of the court was upon one subsequent ; that the defendant was sworn and examined as a witness ; that he took minutes of the defendant's testimony, not *in totidem verbis*, but all that he deemed material

at the time ; that he thought that the defendant did not make a full and exact statement of the incumbrances on the real estate after his failure ; that he had not any memorandum that the defendant had testified that he gave notice of this old mortgage to Heard and Oliver, at and before the time of the conveyance by him of the property to the company, and that he did not recollect that it was made a point at the hearing.

H. F. M. Miller testified, that he, as junior counsel, drew up the bill in chancery, which was afterwards signed and verified on oath by Messrs. Oliver and Heard ; that prior to its signature and verification, he read over the material parts to both, not *in totidem verbis*, but only those which were material ; that neither of them objected to signing the paper or to the oath. But the witness said, that he had before him, when he drew the bill, the agreement, to which were attached seals, but without any signatures. Supposing that the counterpart in the hands of the defendant had been executed by the parties, as the one before him purported to have been, he so set it forth. He had no recollection of calling Mr. Oliver's attention particularly to that fact.

Fletcher, in closing the argument for the defence, contended, that the government had failed to prove satisfactorily the false testimony complained of, which was the foundation on which the prosecution rested. But, on supposition that the testimony of Thomas Lord was correct, and that the defendant did, on his examination, swear as was alleged against him, the evidence to prove that it was false was not to be relied upon, inasmuch as it had been abundantly shown, that the memory of both Oliver and Heard was treacherous and weak, and was not to be relied upon in a matter of long standing. He further argued, that this prosecution had grown out of a series of controversies between the defendant and the Ipswich Manufacturing Company, whose confidential agent the defendant had been until his failure in 1837, by which the company had been a great sufferer, and in consequence of which the payment of this old

mortgage was likely to fall upon them without the hope of redress. While all this accounted for the exasperated state of their feelings, it should admonish the jury to distrust the testimony of the principal witness, and to leave the final settlement of their conflicting rights to the event of the bill in chancery and of other civil suits which were pending between the parties. He finally argued, that the alleged false testimony was not material to the matter which was in hearing before the supreme court at the time ; and that even if it should be deemed material, and a ground for a charge of perjury, there was no evidence to prove that it was wilful or corrupt.

Parker then closed for the commonwealth.

THACHER, J., in committing the case to the jury, said, that whatever serious causes of mutual complaint subsisted between the Ipswich Manufacturing Company and the defendant, the jury were to confine themselves to the accusation in the indictment, which was that of a corrupt and wilful perjury. The matter of the testimony was perfectly known to the defendant, and if he had, at the hearing before the supreme judicial court, sworn falsely, it must have been deliberate and wilful, and could hardly have proceeded from other than a corrupt motive. Of that, however, they were the responsible judges. But it belonged to the jury, on their responsibility, to decide, whether the evidence had, to their reasonable satisfaction, convinced them, that the defendant did testify as was charged against him in the indictment. This rested principally on the testimony of Thomas Lord, in which he was not corroborated so fully as was to be desired, in order to gain implicit belief, and whose statements were weakened, if not contradicted, by the defendant's witnesses. If, however, they believed that the government had established the charge against the defendant, as to the testimony complained of at the hearing ; they were still to be satisfied by the evidence, beyond a reasonable doubt, that that evidence was false, and so known to be by him at

Commonwealth v. Benesh.

the time. This depended on the testimony of Francis J. Oliver and George W. Heard, which there had been an attempt to impugn both by testimony and argument, and which was to be weighed by the jury with that impartiality and intelligence that would always furnish a source of satisfactory reflection to their own minds, and do credit to their fidelity to the public justice. The court said that the examination of the witnesses had been so minute, and the arguments of the counsel so elaborate, that it was not necessary to occupy their time in recapitulating the evidence.

The jury returned a verdict of not guilty.

SEPTEMBER TERM, 1842.

COMMONWEALTH v. MORRIS BENESH.

Where property was obtained by false pretences fraudulently, and the defendant failed to show at the trial what he had done with it or with the proceeds; it is not sufficient ground to authorize a new trial, that he is now desirous to prove that fact, and expects that it would influence the jury in his favor.

Where, in the trial of an indictment for obtaining goods by false pretences, a book was produced in evidence, in which the representations made by the defendant, at the time of procuring the goods, were recorded, and after conviction the counsel for the defence moved for a new trial, because, since the trial, it had been discovered, upon the examination of the book, that the entry made therein of such representations by the prosecutor, and sworn to by him as having been entered at the time they were made, was in fact entered many weeks after the making of such representations; and because the jury were misled by the statements of such prosecutor, and of the prosecuting officer in relation to the time of such entry; it was held that this was no ground for a new trial.

If the party or his counsel failed in diligence in preparing for the trial, or if there was a difference in opinion between them as to the best mode of defence, and there was no surprise, a new trial will not be granted.

THE defendant was indicted at the August term, 1842, under

the revised statutes, (c. 126, s. 32,) for obtaining goods of William P. Abbott and Daniel Whittier, to the amount of six hundred and eighty-nine dollars and ninety-five cents, by false pretences. He was tried at that term and convicted. He was defended by *George W. Phillips*. A motion for a new trial was made, the grounds of which, and the proceedings at the trial, will appear in the following opinion of the court.

Parker, for the commonwealth.

Park, for the defendant.

THACHER, J. The defendant, having been found guilty of the offence alleged against him in the indictment, complains, that owing to a mistake which occurred between him and his counsel, he lost the benefit of exhibiting to the jury certain evidence material to his defence; and that a material witness was absent at the trial, whom he had reason to expect would have been present. The motion does not state the name of the witness, nor the facts to which he would testify; but they are stated in his affidavit, which accompanies the motion. He refers to certain certificates of the jurors, made since the trial, for the nature of the material evidence which he lost, and to the opinion expressed by some of them, that if it had been offered to them at the trial they should not have agreed on a verdict. All the jury have joined in a request, that a new trial may be granted. Whatever doubts may have formerly rested on the subject, it is now settled, "that this court has the power, in criminal cases, on the petition or motion in writing of the defendant, to grant a new trial for any cause for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done." (Rev. St. c. 86, s. 10, and c. 138, s. 10.) "The grounds of granting new trials," says Professor Woodeson, "are very various; as, first, where there is any misconduct in the jurors, or reason to suspect their indifference. A new trial may also be granted for the misdirec-

tion¹ or errors of the judge, who tried it, as in improperly receiving or rejecting evidence. Yet if the supposed misdirection² be a technical objection in point of law, and substantial justice be done, or, generally, if the merits have been fairly and fully tried, a new trial will not be granted; for the application is to the discretion of the court.³ But the granting of this motion most frequently depends on the judge's certificate, giving a narrative of the former trial; as if it appear on his statement of it, that the verdict was against evidence, or that the damages were excessive; though the court is very scrupulous of seeming to interfere with the province of the jury on this latter ground."⁴ "A new trial may be granted, where a party is disappointed by sickness or the like, of the attendance of a material witness, or upon a discovery of fresh and important evidence.⁵ But a voluntary defect of preparation, or a mistake in conducting the cause, or the want of such evidence or defence as it was in the party's power to have produced at the former trial, or a discovery of the incompetence of the witnesses examined, are not substantial reasons for defeating the present effect of the standing verdict." (3 Woodeson's Lec. 352, &c.) And where any person is properly in court, and doth not defend his title, or neglects to show his right, he is as properly barred as he which hath no title. (Rol. Abr. 396.) The principles laid down in the books, relative to granting motions for new trials, are strict. In *Price v. Brown*, (Str. 691,) the court refused a new trial, saying, it would be of dangerous consequence to suffer people to be setting up new evidence, after they knew what was sworn before. In *Ashley v. Ashley*, (Stra. 1142,) the court refused to grant a new trial, where there was evidence on both sides. They say, "as there was evidence on the part of the defend-

¹ 2 Salk. 649.² 2 Durn. & East, 4, 5; 3 Wils. 273.³ See Rep. B. R. Hardw. 23.⁴ Prec. c. 194; 2 Salk. 647, 653; 6 Mod. 22; 1 Wils. 98; Fitzg. 40; Stra. 691.⁵ Cowp. 230-1; 1 Durn. & East, 277; Black. 942-3, 1327, &c.; 4 Durn. & East, 651, &c.

ant, the jury are the proper judges which scale preponderates. It cannot be said to be a verdict against evidence, and therefore we will grant no new trial." In *Bright v. Eynon*, (1 Burr. 393,) Lord Mansfield says, "a new trial is no more than having the cause more deliberately considered by another jury; when there is a reasonable doubt, or perhaps a certainty, that justice has not been done. Most general verdicts include legal consequences, as well as propositions of fact; in drawing these consequences, the jury may mistake, and infer directly contrary to law. The parties may be *surprised*, by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer." The cases in our own reports, which were referred to at the hearing, namely, *Drew's case*, (4 Mass. 399,) and *Bond v. Cutler*, (7 Ib. 207); also, *Gardner v. Mitchell*, (6 Pick. 114,) where a new trial was refused on the ground of newly discovered evidence, which was merely cumulative in relation to facts testified at the trial; and the case of *Cutler v. Rice*, (14 Mass. 494,) are in accordance with the decisions of the eminent English judges to which I have referred.

I have never been averse to receive motions for new trials in this court, nor to the labor attending them; considering that the reputation of the court and the peace of the community preëminently depend on the correct administration of the public justice. Before it was settled by statute, that the court had the right to grant new trials, I not unfrequently received and considered motions for that object. A new trial is granted, where the court has erred in a material point of law; or where by surprise or accident, the party has not had a fair trial; or the court shall become satisfied, that justice has not been done. Why should not any court, whether supreme or subordinate, allow a new trial in such case? It is but correcting an error, and preventing a wrong, and securing to the parties and to the law their right. The defendant says, that he is able to show what he did with the property received from Messrs. Abbott &

Whittier, the complainants, on the 12th day of May last, and from others afterwards, to the time of his petition for bankruptcy on the 15th day of July following; and that it was owing to a mistake, or to a misunderstanding between him and his counsel, at the trial, that the evidence was not shown to the jury. If the verdict had depended on the exhibition of this testimony, and by reason of its exclusion, the prisoner has been convicted, I should be reluctant to hold him to the strict rules of law. For he was not conversant with the rules of law, and his counsel might have been surprised by the discovery at the very last moment, as the jury were about to retire to their conclave to agree upon their verdict. Indeed, I do not see any just ground to be dissatisfied with the course of Mr. Phillips. He conducted the defence at the trial with learning and ability. All that I would require, in such case, would be to be assured that there was no designed concealment, or suppression of the evidence, and that the motion for a new trial was not an afterthought by the defendant and his counsel, or by either of them, with a view to further proceedings on their part, which might have a more favorable result.

But suppose that the evidence had been shown, at the trial, ought the verdict to have been different? This cannot depend, in any respect, on the opinions expressed since the trial, by the jurors who rendered the verdict. As well might the certificates of other intelligent citizens, who were not engaged in the trial, be exhibited to the court, and be expected now to affect its judgment. For the new opinions of the jurors have been formed on applications out of court, and on *ex parte* representations, perhaps influenced too by urgent solicitation, which men of humanity can hardly resist. Whether the evidence was pertinent, or, if admissible, whether it ought to weigh on the minds of a jury empaneled for the trial, are matters of pure law, and belong exclusively to the consideration of the court. It is for the court to consider what ought to be the legal effect of new evidence, and it is not proper to go to the jurors after they have

rendered a verdict. The law is so jealous of extraneous influence, and so solicitous that jurors should be indifferent and without prejudice, that it will not allow any one to be sworn on the panel who has before formed or expressed an opinion, or is sensible of any bias, or who should labor under suspicion of being more favorable to one side than to the other. It is, therefore, considered a misdemeanor in a party who shall, directly or indirectly, try to prejudice a juror in his own favor, or against the opposite party, out of court; and the law would punish him, or any friend or other third person, who should apply to a juror, either before or during the trial, with a view to pervert the course of justice. The certificates, in this case, were not under oath, nor were they considered as the sworn act of the jury. In the case of *Rex v. Simmons*, (1 Wilson's R. 329,) indicted for putting three ducats into the pocket of one Ashley, with a malicious intent to charge him with felony, the affidavit of the twelve jurors was received, that the verdict of guilty had been entered contrary to their meaning. On rendering the verdict, the foreman said, that they found him guilty of the fact, but without any intent. By mistake, a general verdict of guilty was entered. In the report of Justice Procter, who tried the cause, it was clear that there was an error either of the jury or the court, and therefore a new trial was granted. The learned attorney for the commonwealth has filed, in this case, a written protest against the court receiving the certificates of the jurors. I considered it was the duty of the court to receive the certificates, and to give to them all the weight to which they were entitled. The general rule which excludes these certificates, admits exceptions which are to be judged of by the court as they arise.

A review of the course of the trial and of the evidence will enable us to decide whether justice was done.

The defendant was indicted, at the last August term, upon the 32d section of the 126th chapter of the revised statutes, for obtaining, on the 12th of May, 1842, the goods of William P.

Abbott and Daniel Whittier, copartners, to the amount of six hundred and eighty-nine dollars and ninety-five cents, by false pretences, with intent to defraud them. The false pretences alleged in the indictment were, 1. that he owned a certain house and piece of land and real estate in Chelsea, worth four thousand dollars, which was incumbered by a mortgage for seventeen hundred dollars; that he was the owner of the land and house, and mortgaged it for that sum, and that the mortgage had five years to run; 2. that he owed but little money, that his personal debts did not exceed three hundred or four hundred dollars in all, that he did not owe more than four hundred dollars, when all his debts due from him were added together."

After a trial of two days, the verdict was rendered against him on the 10th day of August. There was no application for delay, and no suggestion of the absence of any witness, or that time was wanted for preparation. It was a case in which delay would have been granted, if requested; as the witnesses resided in Boston, and the verdict was final. If he was surprised at the absence of Morris, and deemed his testimony material, he should have moved for delay for that cause, which probably would not have been denied. William P. Abbott, Benjamin F. Cochran, and Henry S. Whitmore were called as witnesses for the government, and each was, upon the motion of Mr. Phillips, examined in the absence of the others.

Abbott testified, that the defendant applied to him, on the 12th day of May, for a credit of goods. Not knowing him, he asked for a reference, and was referred by the defendant to Joseph W. Plympton, in Water street. He went to Plympton, by whom he was told, that he knew nothing of the defendant's property, but believed him to be honest. He returned to his store, and conversed with the defendant about his situation. He said, in reply to the inquiries of the witness, that he had a store of goods in the city where he had done business for some time; that he owned a place in Chelsea, which was worth four thousand dollars, but that he had mortgaged it for seventeen

hundred dollars, which mortgage had five years to run. To the question how much he owed, the defendant said between three hundred and four hundred dollars. Upon these representations witness sold to the defendant goods to the amount of six hundred and eighty-nine dollars and ninety-five cents, on a credit of six months, taking two notes, at his request, payable in five and seven months. The witness declared that he should not have sold and delivered the goods but for the belief of the defendant's representations. On cross-examination, he testified, that on the 5th day of June following, the defendant came to his store, in his absence, and obtained an additional credit of seventy-one dollars and twenty-four cents, and on the eighth day of June, he got a further credit of three hundred and forty-three dollars and twenty-one cents. At this time, the witness again conversed with the defendant respecting his affairs, and he repeated and confirmed his original representations as to his property and business. The witness was confident that the representations were made by him at the time of the first credit, but the subject was fully talked over again at the time of the third. The witness wrote down the representations in a memorandum book, which was kept for such purpose, and was exhibited at the trial.

Benjamin F. Cochran testified that on the 12th day of May, while he was at the store and in the employment of Abbott & Whittier, the defendant was introduced to him by a person named Morris, and the witness afterwards made him known to Abbott. The defendant asked for a credit of goods, and Abbott inquired of him relative to his property, and to whom he should apply for information. The defendant told him, that he had a house in Chelsea which was worth four thousand dollars, on which he had given a mortgage for seventeen hundred dollars, which had five years to run. He also referred to Mr. Plympton, of Water street. Abbott went to see Plympton, and after his return, he consented to the credit, and directed the witness to deliver the goods, which were sent to defendant's store

Commonwealth v. Benesh.

in Hanover street. He obtained soon afterwards another credit of seventy-one dollars, and also a third from Mr. Abbott of three hundred and forty-three dollars. On his cross-examination he said, that on the 12th day of May his residence was in Cambridge, and that he usually dined at the Franklin House, where he recollected to have seen the defendant, whose name he did not know. He was sure that the defendant was introduced to him in the store by one Morris, and that he heard the representations which the defendant made to Mr. Abbott when he first came in. He also said that he had no recollection that he had ever invited the defendant to come to the store to purchase goods.

Henry S. Whitmore was a clerk in the store, and heard the defendant ask Abbott for a credit of goods. He said that he had a store of goods, and did business in Hanover street; but that his property was chiefly in Chelsea, where he owned a house and land, which with the repairs put on it, he valued at four thousand dollars. Abbott asked him if it was incumbered. He replied, that he had put a mortgage on it for seventeen hundred dollars, which had five years to run. Abbott then asked as to his other debts, to which he replied, that they did not exceed four hundred dollars. The witness said, that he was present when the defendant first came to the store, and that he saw a gentleman, whose name was Morris, introduce him to Cochran. He had no knowledge nor suspicion that Cochran had any previous acquaintance with the defendant.

To prove that these representations were false, *James B. Robb*, an assistant clerk in the United States district court, produced a petition in bankruptcy by the defendant, which was sworn to by him on the 15th day of July; by the schedule of which it appeared, that on that day he owed debts to the amount of five thousand seven hundred and sixty-one dollars, and that his effects, including stock in store, household furniture, and some goods in Portland, amounted to eleven hundred and fourteen dollars and ninety-seven cents. It appeared, too,

by the testimony of Mr. John Fenno, that all his right in the land and house in Chelsea consisted in an agreement with the Winnisimmet Company for a deed of the land on payment of two thousand seven hundred and seventy-five dollars therefor, and on which he had paid one hundred dollars only. The agreement was dated February 15, 1842. He was, by that contract, to pay one hundred dollars on the 15th day of March, and the further sum of one hundred dollars every two months, with interest on the whole purchase money until he should have paid ten hundred and seventy-five dollars. He was then to receive a deed, and give his note for seventeen hundred dollars, to be secured by a mortgage of the property, and payable in five years. Whether he ever should receive the deed was to depend on his payment of the ten hundred and seventy-five dollars and interest. But he immediately received possession of the property, and it was proved by John Fenno, the agent for the company, that he made repairs and improvements on the house and land to the amount of six hundred dollars, as he believed, but whether he had paid for those repairs he did not know. It appeared by the schedule, that on the 12th day of May, 1842, the defendant owed in notes and on account three thousand dollars and upwards; and that afterwards, between that date and his petition in bankruptcy, he obtained other credits to the amount of two thousand dollars, including the amount of goods got from Abbott & Whittier. At the trial, the defendant offered no evidence to prove the truth of the representations, which were made by him to Abbott on the 12th day of May, nor that he expected to be able to meet the notes when they should fall due, or in any wise to explain the transaction. He called *Joseph W. Plympton*, whose testimony corroborated that of Abbott. He then called *Richard Burr*, *James H. Long* and *Michael E. Burr*, who had known him for two years, and spoke favorably of his character. The material facts which it is now expected would have been sworn to by Morris, the absent witness, were obtained on cross-examination from

Commonwealth v. Benesh.

Cochran and Whitmore. Both say, that Morris introduced the defendant to Cochran. The latter says, that he had no recollection of having ever invited him to the store. If he had, however, it was for purposes of fair trade, and not for the practice of fraud.

The jury were instructed fully, that this section of the statute, was intended to check the obtaining of goods or property by false representations, and with the intent to defraud. If it was a credit fairly obtained and allowed in the course of business, it was not within the statute of cheating. If the statements were false, still, if they believed from the evidence, that the defendant had a reasonable ground to expect, at the time, that he should be able to meet his engagements to Abbott & Whittier, when they should fall due, it was their province to consider, whether it was a premeditated fraud; and it would be their duty to render a verdict according to the most favorable view which they could take of the case, consistently with their duty as jurors. But the defendant had exhibited no evidence of any losses which he had suffered by bad debts or otherwise; he did not appear to have been worth anything of any amount, when he applied for the credit; he had not shown what had become even of the property so obtained of these complainants and of others soon afterwards. Finally, they were told, that if the evidence satisfied them, that he had knowingly obtained this property by false pretences, and with intent to cheat, he had committed the offence, and the evidence which was offered as to his former good character could not be regarded as proof of innocence.

After taking ample time for consideration, the jury found a verdict of guilty. The verdict appeared to me to be correct, and entirely consistent with the evidence. He now moves for a new trial to be granted to him, not to prove the truth of his original representations, or that they were made by accident, and without intentional fraud, but that he may show what he did with the goods and credits obtained of Abbott & Whittier,

and of others, between the 12th day of May last, and the filing of his petition in bankruptcy. He paid on the 18th day of May, according to the schedule, annexed to his motion and affidavit, one instalment of one hundred dollars on his contract with the Winnisimmet Company; also sundry old debts, family and travelling expenses; also money to several persons employed as pedlars, and for repairs and improvements on his land in Chelsea. It is not to be presumed that Abbott & Whittier would have consented to the delivery of their property to an insolvent man, who wanted it for the purpose of paying existing debts. The defendant must have been aware of this by his concealment of his actual situation, and by the false representations which he made of his property, at the time he got the credit. He certainly owned no real estate, and his debts, on the 12th day of May last, amounted, at least, to three thousand dollars. That he knew that the pretences were false, is fairly to be inferred from the schedule which is attached to his petition in bankruptcy, and from his intelligence and apparent knowledge of business. The defendant would have been permitted, probably, to show, at the trial, what he did with the property obtained from Messrs. Abbott & Whittier, and others. But unless he could also prove the truth of the pretences on which he relied for credit, or, at least, that he had a reasonable expectation of being able to meet the payment of the notes when they should fall due, the proof now offered, which was in his possession at the time of the trial, would not authorize the jury to change the verdict, or to refuse to agree on one. And it is well said, "there is that common credit to be given to twelve men of the country, discerning of any fact upon their oaths, that no second jury ought rashly to depart from their judgment."¹

Therefore, it is the judgment of the court, that the motion be denied.

¹ Gilbert's Law of Evidence, Lond. 4th ed. 1787, p. 29.

By reason of sickness in the defendant's family, the case was continued to the following October term for judgment. In the mean time, a second motion for a new trial was filed, which was argued on the 29th day of October, 1842. It was contended, that the verdict was the effect of surprise, and that new evidence had been discovered since the decision of the first motion. The grounds of the motion and argument appear in the following opinion of the court, pronounced on the 5th day of November, 1842, which was the last day of the term.

Parker, for the commonwealth.

Choate and George W. Phillips, for the defendant.

THACHER, J. One of the remarkable circumstances attending the present motion, is the fact, that it was entirely overlooked in the former motion for a new trial, which was made and argued in August last, and deliberately overruled and settled on the first day of the following September term. If there is ground for the motion now, it existed at that time, and should have been brought forward then. For parties are not at liberty to bring motion after motion for the same purpose. The new evidence on which the defendant relies, was used at the trial, and it cannot be considered as a new discovery; there would be no end to litigation, if it were allowed. But it has been said that the present is a new and an unparalleled case, and requires a rule for itself. My respect for the eminent counsel who has argued it, and my sincere desire for the correct administration of justice in this court, have induced me to pay to it the utmost attention.

The motion was filed in court on the 22d day of October. The ground relied upon for setting aside the verdict, and for a new trial, is, "because the book produced by William P. Abbott, at the trial, containing the entry of the representations alleged to have been made by Morris Benesh, is a book in which entries were made, in chronological order; and the representations, sworn by said Abbott to have been made to him

by said Benesh, on the day on which they were entered therein, never could have been so entered, till many weeks after the time of the sale and delivery of the goods: And further, that the jury who tried the cause, were entirely misled by the statement of the prosecuting officer, as well as of said Abbott, made at the trial, that the mode of keeping said book was such, as to prevent any inference as to the time when any entry without date was made therein, from the dates of the other entries preceding it. All which, he says, has come to his knowledge since the trial, and since the hearing of his former motion for a new trial."

The motion contains another ground for setting aside the verdict; but as that was fully considered and settled under the former motion, the counsel declined any argument on the subject. Before this motion of the defendant was filed, namely, on the 12th day of October, his counsel, George W. Phillips, had filed his own affidavit, for the purpose of bringing the subject again to the consideration of the court. In that affidavit, Mr. Phillips says, "that since the former motion for a new trial was refused, he had ascertained, that a clear mistake was made in regard to the book, in which Abbott testified, that he had entered a memorandum of the false pretences, alleged to have been made by Benesh; that Abbott testified at the trial, that the goods in question were sold on the 12th day of May, 1842; and that he entered a memorandum of the representations which induced the credit, on the day and at the time when they were made by Benesh; that since the refusal of the former motion, he has seen the book in the possession of said Abbott, and has ascertained, that the entries therein are in chronological order; that the entry relating to Benesh is made without date, but after several others bearing a date subsequent to the time of the sale of said goods." Mr. Phillips states further in his affidavit, "that the book was produced at the trial, in answer to notice to that effect from him, having never been before that produced or exhibited to said Benesh or his counsel, either in

Commonwealth v. Benesh.

the lower court, or at any other time whatever ; and that at the trial said Abbott testified, that no light was to be obtained from the date of the entries therein, as it was an indexed book. Mr. Phillips adds, that believing that said Abbott had testified under a mistake, as to the real time of the said entries, and that the real character of the said book was entirely overlooked by the prosecuting officer, and by the jury who tried the cause, as well as by himself, he informs the court of the matter, that such steps may be taken before further proceedings are had, as to the court seem meet."

Ten of the jury certify upon this affidavit, "that no examination was made by them of the book produced by Abbott, at the trial, with reference to a comparison of the dates of the different entries therein, and that they relied on the positive statement of Abbott, that the memorandum was made on the day of the first sale to the defendant." But, as this certificate of the jurors was not deemed adequate, there were read at the hearing affidavits of four of these jurors, sworn to on the 26th day of October, but all of the like tenor, in which they say, "that they made no examination of the book, produced in evidence by Abbott, to ascertain whether anything could be inferred as to the time of that entry, from the place it occupied in the book ; and that they deemed such an examination unnecessary, from the fact, that it was stated by the prosecuting officer, during the examination of said Abbott, that the book was an indexed one, and that the entries were made without order, as to dates, or words to that effect." In the certificate of the jurors, which is annexed to Mr. Phillips's affidavit, they say, "that they relied upon the positive statement of Abbott ;" and in their affidavit they say, "that they deemed an examination unnecessary, because the prosecuting officer stated, that the book was an indexed one."

It is clear and palpable to my mind, that the object of this motion is to raise a new and an immaterial issue between the parties ; and for that purpose the jury have been led, perhaps

without much consideration, but with sufficient alacrity, to make certificates and affidavits which have a tendency to show, that they neglected their duty at the trial, in the face of all the facts and evidence in the case. The book was called for by the defendant, and produced at the proper time. It was put into the hands of his counsel, who read it to the jury, and commented upon it; and he does not say, in his affidavit, that he did not examine it, or that he was ignorant of its contents. The jury do not deny in their certificates and affidavits, that they examined the book; but they say, "that they did not examine it with reference to the time of the entry." If they examined it for any purpose, the presumption is, that they examined it for all purposes; at any rate, they cannot now be permitted to say, that they examined it for one purpose and not for another, and to lay the blame of their own omission upon a remark which might have fallen incidentally from counsel. The book went with the other evidence to the jury. They were together, I believe, for nearly twelve hours, and they returned the verdict under their oath. After nearly three months have elapsed, their certificates and affidavits are exhibited in court, discrediting themselves. Shall the jury be believed, when acting in their judicial capacity, under oath, or at this distance of time, when so many foreign influences, unknown to the law, and abhorrent to it, may have been made to act upon their minds? I have read the documents, in this case, with admiration of the industry of the counsel who has prepared them, and the simplicity of the jury. Affidavits, made out of court, are expected to reverse all those proceedings, which were transacted in court, in the most solemn forms known to the law. What is said in court incidentally by counsel, or even in deliberate argument, cannot alter the evidence, or be regarded as having influence on the jury, when the documents are in their own hands, and free to their inspection. If the prosecuting officer said at the trial, it was an indexed book, it did not alter the nature of the book or its contents. But it so happens, on inspection, that there is

Commonwealth v. Benesh.

an index to the book; and part appears to be kept in alphabetical order, and part in the order of time. It is a mere memorandum book, not known to merchants for keeping accounts, but to aid the memory of statements made by persons to whom Abbott & Whittier have sold goods on credit, in the course of dealing. Any person may keep such a book, and make entries in it in any way which he shall choose. Nothing is to be conclusively inferred from that book, especially from such entries as have been made in it, since the first motion for a new trial was denied.

It must be recollected too, that the production of this book was called for by the defendant, and was shown by him to the jury in evidence. The government did not offer it in evidence, nor contradict it, nor attempt to qualify it. It was, in truth, the testimony of the defendant upon a collateral matter; because it was not necessary, that there should be any written entry of the representations; and if made, it was not material at what time they were entered in the book. If the false representations were made in this case at the time the credit was given, it was, I conceive, wholly immaterial, whether they were recorded or not. How was this fact, as it appeared in evidence at the trial? To guard against mistake or collusion, the witnesses were, on the motion of the defendant, examined, at the trial, separately, and in the absence of each other. Three witnesses were called by the government, and examined separately on this point. They were William P. Abbott, Benjamin F. Cochran, and Henry S. Whitmore, all of ripe age and apparent discretion. They stated, that they were present on the 12th day of May, when the defendant came to the store, and was introduced to Cochran, by whom he was introduced to Abbott. He asked for a credit; and to inquiries made by Abbott, he spoke of his store in Boston, of the amount of his debts, and of his real estate in Chelsea, as alleged in the indictment. Abbott left the store to see Plympton, to whom defendant had referred; and after his return, the goods were delivered. Abbott testi-

fied, that he did not learn anything of defendant's pecuniary ability from Plympton, who knew nothing of it; and that he trusted him entirely on the faith of the truth of his representations. Here were three independent witnesses, who testified, that the defendant made these representations, when he first came to the store, and obtained the goods. That was the material time, and the fact was established, without contradiction, as firmly as any fact is usually proved in a court of justice.

Abbott was subjected to a minute cross-examination, in the course of which he said, that he was sure, that these representations were made at the time of the first purchase, and that he made an entry of them in his memorandum-book, on the same day on which he sold the goods. This book he produced on the defendant's notice. He said that the entry was without date, and that he added the last clause some days after. He said, that he made no inquiry respecting the truth of the representations, but believed them to be true at the time. This witness was called again by the defendant, and, in reply to a question of his counsel, said, that he added the clause, "buys hard-ware of Oliphant & Co." because he thought it might be convenient to refer to them in case of necessity. This fact was stated to him by the defendant, at the time of the third purchase, which was on the 8th day of June; when, having increased his debt to upwards of eleven hundred dollars, they conversed together again more fully respecting defendant's property and means of payment. The memorandum was before the jury, open to inspection, and free to remark; and was commented upon by the counsel on both sides. How then can it be now said, by the counsel, that anything in it was a discovery of new evidence since the trial, and since the refusal of the former motion? It appears to me to have been fully established, at the trial, by the witnesses for the government, that the alleged false representations were made by the defendant, prior to the completion of the sale and delivery of the first amount of goods; and, if so, it is, in my opinion, wholly imma-

terial, whether the entry was made, in the memorandum-book, on that day or soon afterwards. Witnesses, we know, are exceedingly apt to err about time and dates, while facts are deeply engraven on the memory and not easily effaced.

I cannot, therefore, without a dereliction of duty, set aside a satisfactory verdict, the fruit of a trial of two days, including the time of the deliberation of the jury, in order to give to the defendant an opportunity to raise a new issue upon an immaterial point. My opinion is, that justice was done by the verdict. It was not the fruit of exhaustion; for the jury were furnished with needful refreshment, by order of court, after they had been together for some hours to a late hour in the evening. The trial was conducted, as I thought, with perfect fairness on both sides. There was neither accident, mistake, nor excitement; and no advantage was obtained on one side or the other. The book could have occasioned no surprise to the defendant or his counsel; for it was called for by the defendant, and exhibited to the jury by his counsel. There was no lack of zeal or ability in the counsel, and they argued the case freely and fully, without stint. There was no "disingenuous attempt to stifle or suppress evidence, or to thwart the proceedings, or to obtain an unconscionable advantage, or to mislead the court and jury." Certainly nothing of that kind was observed by me. The jury were instructed to return a verdict for the defendant, if they had a reasonable doubt of his guilt. But the evidence was plenary and convincing; the defendant was deeply insolvent at the time that he obtained these goods, and his representations were entirely false; and although in cases of this description, jurors are hard to be convinced, and slow to convict; yet no one, I believe, who attended the trial, expected a different result. I know not how to account for it, that so many of the jurors should have been led, at this distance of time, to think that they were in an error. I should have been glad to have found good cause for a new trial. But I am bound to decide the matter according to my conscience, believ-

ing, that to set aside a verdict, which has been fairly rendered, without sufficient cause, would justly expose the court to the charge of want of firmness, or to the suspicion of a desire to gain popularity at the expense of duty.

The defendant was sentenced to pay a fine of two hundred dollars and costs, and to suffer six months imprisonment in the county jail.

Commonwealth v. Benesh.

Abbott and Daniel Whittier, copartners, to the amount of six hundred and eighty-nine dollars and ninety-five cents, by false pretences, with intent to defraud them. The false pretences alleged in the indictment were, 1. that he owned a certain house and piece of land and real estate in Chelsea, worth four thousand dollars, which was incumbered by a mortgage for seventeen hundred dollars; that he was the owner of the land and house, and mortgaged it for that sum, and that the mortgage had five years to run; 2. that he owed but little money, that his personal debts did not exceed three hundred or four hundred dollars in all, that he did not owe more than four hundred dollars, when all his debts due from him were added together."

After a trial of two days, the verdict was rendered against him on the 10th day of August. There was no application for delay, and no suggestion of the absence of any witness, or that time was wanted for preparation. It was a case in which delay would have been granted, if requested; as the witnesses resided in Boston, and the verdict was final. If he was surprised at the absence of Morris, and deemed his testimony material, he should have moved for delay for that cause, which probably would not have been denied. William P. Abbott, Benjamin F. Cochran, and Henry S. Whitmore were called as witnesses for the government, and each was, upon the motion of Mr. Phillips, examined in the absence of the others.

Abbott testified, that the defendant applied to him, on the 12th day of May, for a credit of goods. Not knowing him, he asked for a reference, and was referred by the defendant to Joseph W. Plympton, in Water street. He went to Plympton, by whom he was told, that he knew nothing of the defendant's property, but believed him to be honest. He returned to his store, and conversed with the defendant about his situation. He said, in reply to the inquiries of the witness, that he had a store of goods in the city where he had done business for some time; that he owned a place in Chelsea, which was worth four thousand dollars, but that he had mortgaged it for seventeen

hundred dollars, which mortgage had five years to run. To the question how much he owed, the defendant said between three hundred and four hundred dollars. Upon these representations witness sold to the defendant goods to the amount of six hundred and eighty-nine dollars and ninety-five cents, on a credit of six months, taking two notes, at his request, payable in five and seven months. The witness declared that he should not have sold and delivered the goods but for the belief of the defendant's representations. On cross-examination, he testified, that on the 5th day of June following, the defendant came to his store, in his absence, and obtained an additional credit of seventy-one dollars and twenty-four cents, and on the eighth day of June, he got a further credit of three hundred and forty-three dollars and twenty-one cents. At this time, the witness again conversed with the defendant respecting his affairs, and he repeated and confirmed his original representations as to his property and business. The witness was confident that the representations were made by him at the time of the first credit, but the subject was fully talked over again at the time of the third. The witness wrote down the representations in a memorandum book, which was kept for such purpose, and was exhibited at the trial.

Benjamin F. Cochran testified that on the 12th day of May, while he was at the store and in the employment of Abbott & Whittier, the defendant was introduced to him by a person named Morris, and the witness afterwards made him known to Abbott. The defendant asked for a credit of goods, and Abbott inquired of him relative to his property, and to whom he should apply for information. The defendant told him, that he had a house in Chelsea which was worth four thousand dollars, on which he had given a mortgage for seventeen hundred dollars, which had five years to run. He also referred to Mr. Plympton, of Water street. Abbott went to see Plympton, and after his return, he consented to the credit, and directed the witness to deliver the goods, which were sent to defendant's store

cial court also, and the municipal court commenced its session on the third day of March, and the supreme court commenced its session on the fourth day of the same month, — and the municipal court was adjourned to the tenth day of the month, in order that the grand jury of the supreme court might serve at the March term of the municipal court; it was *held*, that this was no reason for arresting a judgment, founded upon an indictment for an offence committed prior to the finding of the indictment. *Commonwealth v. Read*, 180.

ASSAULT AND BATTERY.

See JURISDICTION, 3.

ATTACHMENT.

Under the act of 1795, c. 41, the attachment of property by a deputy sheriff, includes the keeping of the property in his safe possession. *Commonwealth v. Dennie*, 165.

BANKS AND BANKING.

See PERJURY, 1, 2. COUNTERFEITING, 3, 8, 10. EVIDENCE, 8, 10.

BASTARDY.

1. The surety of the putative father of a bastard child, in a bond conditioned to support the mother and child, upon the death of such father, has a right to petition the court for a discharge from the bond, and to support the same by his affidavit. *Hoch v. Lord*, 263.
2. In a complaint against a person, under the bastardy act of 1785, c. 66, as father of a bastard child, born in the county of Middlesex, it was *held*, that the municipal court had jurisdiction, notwithstanding the birth was out of the county. *Lord v. Schweiring*, 26.
3. Evidence on the part of a complainant under the bastardy act of 1785, c. 66, is admissible, as to her former character and conversation, and, if her testimony be contradicted, as to her general character for truth. *Id.*

BILL OF RIGHTS.

See CONSTITUTIONAL LAW.

BLASPHEMY.

Under the act of 1782, c. 8, (Rev. St. c. 130, s. 15,) presumptuously reviling the name and attributes of God, or the fundamental principles of the common belief of Christians, is blasphemy. The act of 1782, c. 8, is constitutional. *Commonwealth v. Kneeland*, 346.

BUILDINGS.

1. It is not necessary, in order to recover the penalty provided in the first and second sections of the statute of 1817, c. 171, prescribing the thick-

- ness of the walls of buildings to be erected in the city of Boston, to give the notice mentioned in the eighth section of the same chapter. *Commonwealth v. Cutler*, 137.
2. Any citizen may prefer a complaint to the grand jury, or to the public prosecutor, who is authorized to proceed on such information, against a person erecting a building in the city of Boston with walls less thick than the statute prescribes. *Ib.*
 3. An information, charging in the words of the statute, that the defendant erected the building complained of, is sufficiently certain, although it does not state whether he was the owner. *Ib.*
 4. A complaint can be made against a person erecting a building in the city of Boston, with walls less thick than the statute prescribes, as soon as the building, in its general outline, is completed in those points to which the statute refers. *Ib.*
 5. Under the statute of 1822, c. 16, allowing wooden buildings of certain dimensions to be erected in the city of Boston, brick buildings of similar dimensions, and with the same thickness of external partition wall, may be erected. *Ib.*
 6. Under the statute of 1835, c. 139, regulating the size of wooden buildings to be erected in the city of Boston, it is not lawful to erect a building ten feet on the ground in length, by five in width, and forty-two feet in height, three sides of which are of wood, against the wall of a brick dwelling-house, to be used as a staircase; although such building be covered with zinc. *Commonwealth v. Prescott*, 507.

BY-LAWS OF THE CITY OF BOSTON.

1. The by-law of the city of Boston, forbidding the driving of horses with wagons, carts, trucks, and sleds attached, faster than at a moderate footpace, is reasonable and for the public good, and the city government had power to enact the same, without the adoption thereof in a town meeting; and also without the express permission of the legislature. *Commonwealth v. Worcester*, 100.
2. Under the twenty-third article of the bill of rights, which declares that no tax shall be imposed on the subject, without the consent of the people, and under the statute of 1821, c. 146, (Rev. St. c. 58,) which allows any dog to go at large, if he wear a collar with the name of the owner on it, it was held, that the city of Boston had no authority to pass an ordinance, requiring from the owners of dogs going at large the payment of a sum of money for a license. *Commonwealth v. Dean*, 86.
3. The by-law of the city of Boston, of August, 1833, making it the duty of the occupants of buildings to remove the snow from the sidewalks adjacent to them, is not in the nature of a tax upon property, and therefore not contrary to the fifteenth section of the city charter; and is not repugnant to the special laws relating to the streets of the city. *Commonwealth v. Goddard*, 420.

4. Under the statute of 1803, c. 111, which annexed a part of Dorchester to Boston, under the name of South Boston, the inhabitants of South Boston were properly exempted from the operation of such by-law. *Id.*
5. Where, under a complaint for an alleged violation of a by-law of the city of Boston, prohibiting the occupation of any part of Washington street, as a stand for hourly coaches, the court was asked to decide upon an agreed statement of facts, whether an offence had been committed, and it appeared that the alleged by-law was an order of the mayor and aldermen, without the concurrence of the city council; it was *held*, that such order was not a by-law, and that the question presented by the statement of facts, whether a nuisance at common law had been committed, could not be determined under such a complaint; and it was also *held*, that the question whether a nuisance at common law had been committed, could only be determined by a jury. *Commonwealth v. Harding*, 270.
6. The statute of 1817, c. 50, providing for the recovery of fines under by-laws of the city of Boston, is constitutional. *Commonwealth v. Goddard*, 420.

See CONSTITUTIONAL LAW, 3. EVIDENCE, 13, 14, 15, 16. EX POST FACTO LAW. JURISDICTION, 1. MARKET, 1, 2, 3. PENALTY.

CASHIER.

See PERJURY, 1, 2.

CHALLENGE.

See DUELLING.

CITY OF BOSTON.

See BY-LAWS. BUILDINGS. MAYOR AND ALDERMEN. WAY,

CITY CHARTER.

See BY-LAWS, 3.

CITY COUNCIL.

See BY-LAWS, 5.

COMMON LAW.

See CONSPIRACY, 1. BY-LAWS, 5. PERJURY, 3. FORGERY, 1. LIBEL, 1.

COMPLAINT.

When a complaint for a breach of the city by-laws did not set forth the ordinance at length, it was nevertheless *held* to be sufficient in point of form. *Commonwealth v. Nightingale*, 251.

See BASTARDY. BY-LAWS. BUILDINGS, 2, 4. EX POST FACTO LAW.

CONFESSIONS.

See EVIDENCE, 5. LIBEL, 6, 7. GAMING, 3.

CONSPIRACY.

1. A combination among journeymen bootmakers, to compel, by force of numbers and discipline, and by imposition of fines and penalties, other journeymen to join their society, and masters to employ none but members, is an unlawful conspiracy at common law, in Massachusetts. *Commonwealth v. Hunt*, 609.
2. The gist of the offence of conspiracy consists in a confederacy to do an unlawful act, and the offence is complete when the confederacy is made. It is not necessary to complete the offence that the confederacy should be to commit an act which is indictable. *Id.*

See EVIDENCE, 18.

CONSTABLE.

See OFFICER. JURISDICTION, 3.

CONSTITUTIONAL LAW.

1. The act of 1782, c. 8, against blasphemy, is constitutional. *Commonwealth v. Kneeland*, 346.
2. The act of 1817, c. 50, providing for the recovery of fines under by-laws of the city of Boston, is constitutional. *Commonwealth v. Goddard*, 420.
3. The city ordinance, passed November 13, 1826, for the due regulation of the market, is valid and binding upon the citizens of the commonwealth. *Commonwealth v. Nightingale*, 251.
4. Where, after a jury had been empaneled to try the issue, the evidence on the part of the commonwealth finished, and the prisoner called on for his defence, one of the jurors was attacked with a sudden illness, and dismissed by the court, and the jury was consequently discharged, and a new jury impaneled, and the prisoner tried; it was held, that this was not contrary to law, nor repugnant to that clause of the constitution of the United States, which declares that "no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb." *Commonwealth v. Merrill*, 1.

See BY-LAWS, 1, 2. EX POST FACTO LAW.

CONSTRUCTION.

See EVIDENCE, 28.

CONTINUANCE.

Where there is cause to apprehend, that, owing to an excited state of the public mind, a jury may not be as free to render justice to the defence as to the prosecution; there is good reason for a continuance of the case,

until there has been opportunity for the excitement to subside. *Commonwealth v. Dunham*, 516.

CONTEMPT OF COURT.

Where, on account of the sickness of a person summoned as a witness, his book-keeper was summoned to appear and bring his employer's book of original entries, and upon his appearance with the book without first informing his employer that he was to bring it, the defendant obtained the book from him and sent it to the employer; it was *held*, that the defendant was guilty of a contempt of court. *Commonwealth v. Braynard*, 146.

COUNTERFEITING.

1. A bank bill of another state is a promissory note within the statute of 1804, c. 120, against passing counterfeit money. [Rev. Stat. c. 127.] *Commonwealth v. Riley*, 67.
2. It is no justification, on a trial of persons for having in their possession with intent to utter counterfeit bills, that they were passed at a gaming table. *Commonwealth v. Woodbury*, 47.
3. The Bank of the United States was licensed and authorized as a bank in this commonwealth, within the meaning of the statute of 1804, c. 120, against passing, or having with intent to pass, counterfeit money. *Ib.*
4. Upon the trial of a person for passing a counterfeit bill, under the statute of 1804, c. 120, (Rev. St. c. 127,) the omission to allege in the indictment that the defendant passed the bill with an intention to defraud, is fatal. *Commonwealth v. Goodenough*, 132.
5. Under the statute of 1804, c. 120, it should be averred in the indictment, that the defendants intended to injure and defraud, that being, by the statute, a substantive part of the offence. [Rev. St. c. 127.] *Commonwealth v. Woodbury*, 47.
6. On the trial of two persons for having in their possession, with intent to utter, counterfeit bills, proof that one of them had in his possession, at another time and place, a counterfeit bill not mentioned in the indictment, is admissible, to show his guilty knowledge that the bills were counterfeit. *Ib.*
7. An indictment for passing counterfeit bank bills, founded upon the fourth section of the statute of 1804, c. 120, (Rev. St. c. 127,) must allege that the defendant had the bill in his possession, "for the purpose of rendering the same current as true, knowing the same to be false, forged, and counterfeit." *Commonwealth v. Arlin*, 289.
8. The second section of the statute applies only to the bills of the banks of Massachusetts, and those payable at the United States banks therein. *Ib.*
9. If the tenor of a counterfeit bill is set forth in the indictment, although in the caption it is called a bank bill, it is sufficient under the first section of the act. *Ib.*

10. On the trial of an indictment for passing counterfeit bills of a bank in another state, the testimony of experienced brokers, to the fact of the existence of such bank is sufficient. *Commonwealth v. Riley*, 67.
11. In the trial of an indictment for uttering a counterfeit bank bill, it is competent to show the passing of other counterfeit bills about the same time, although other indictments are pending against the prisoner for those acts. *Commonwealth v. Percival*, 293.

See FORGERY. EVIDENCE, 11.

COUNTY OF SUFFOLK.

See FIRE, 3.

COURT.

See NEW TRIAL. BY-LAWS, 5. INDICTMENT, 5. PROSECUTING OFFICER. WITNESS, 11. VERDICT, 2.

CRIMES.

See LOTTERY, 4.

DECLARATIONS.

See EVIDENCE, 5. LIBEL, 6, 7. GAMING, 3.

DEPOSITION.

See EVIDENCE, 20, 21, 22.

DOGS.

See BY-LAWS, 2. PENALTY, 1.

DUELLING.

1. Where, upon the trial of an indictment for carrying a challenge to a duel, in the county of Suffolk, fought in Rhode Island, it did not appear that there had been any trial for the offence in Rhode Island, nor what were the laws of that state in regard to the offence; it was *held*, that, for the purposes of the trial, Rhode Island was a foreign state, and that sending the challenge was, in itself, a substantive offence under the statute. *Commonwealth v. Boott*, 390.
2. In the trial of an indictment for sending a challenge to a duel, it was *held* to be sufficient for the government to prove that a written challenge had been sent, without producing the challenge. *Commonwealth v. Hooper*, 400.
3. In such case the government is not to be presumed to have the original challenge in its possession. *Id.*
4. Upon the trial of an indictment, under the act of 1804, c. 123, for sending a challenge to a duel fought in Rhode Island, proof of an averment

that the duel was not fought in the commonwealth, was *held* to be unnecessary. *Ib.*

See EVIDENCE, 5, 6, 7.

ELECTION.

See VOTING AND VOTERS. MAYOR AND ALDERMEN.

EVIDENCE.

1. To support an allegation in an indictment, for selling lottery tickets, that the offence was committed on a particular day, it is sufficient to prove its commission sometime before the finding of the bill by the grand jury. *Commonwealth v. Braynard*, 146.
2. Where a defendant has voluntarily put his character in issue, and evidence for the prosecution has been introduced, the examination may extend to particular facts. *Commonwealth v. Robinson*, 230.
3. In the trial of an indictment for obtaining goods under false pretences, which set forth that the defendant had obtained the goods under pretence of sending them to Charleston, S. C., the evidence of the person usually employed to cart goods for the defendant, that no goods had been carried by him for the defendant, to any ship bound for that port, was *held* to be admissible. *Commonwealth v. Hershell*, 70.
4. Where, in the trial of an indictment for cheating an insurance company by false pretences, the president of the company testified to certain instructions given by him to one of the defendants, relative to the character of the evidence of the loss required; it was *held*, that the declarations of such defendant, made to a third person, in the absence of the president, after the giving of such instructions, were not admissible to explain or contradict the testimony of the president in regard to them. *Commonwealth v. Drake*, 485.
5. Upon the trial of an indictment for carrying a challenge to a duel, the confessions and statements of the principal, tending to establish his guilt, made in the absence of the second, were *held* to be admissible. *Commonwealth v. Boott*, 390.
6. Upon the trial of an indictment for "giving, sending, and delivering a challenge" to a duel as a second, evidence of a custom for a second to deliver a challenge was *held* to be inadmissible. *Ib.*
7. Upon the trial of an indictment for carrying a challenge to a duel as a second, evidence to show that the defendant was a friend to the principal in a previous difficulty with another person, was *held* to be inadmissible. *Ib.*
8. Where, in the trial of an indictment against the mayor and aldermen of the city of Boston, for neglect in omitting to return certain votes to the governor and council, which were cast in said city, at an election of a member of congress, it appeared, that, after one certificate of the votes

- had been returned, an error had been discovered therein, and an amended certificate returned which had been rejected by the governor and council, and retained by them unopened; it was *held*, that such rejected certificate was admissible, and should be taken from the secretary of state and opened by the court. *Commonwealth v. Mayor and Aldermen*, 298.
9. In such case, it was also *held*, that the report of the committee of the governor and council, to whom such amended certificate had been referred, was legal evidence of the existence of the second certificate, and of the time of its delivery and rejection. *Ib.*
 10. Where, in the trial of an indictment for illegal voting at a ward meeting in the city of Boston, a copy of the record of the proceedings of that meeting, kept by the clerk of the ward, was read, to show that such proceedings were illegal, and oral testimony was offered to prove the same, it was *held*, that such testimony was inadmissible, because the record was the best evidence of the fact. *Commonwealth v. Wallace*, 592.
 11. Where, upon the trial of an indictment for forging and uttering a counterfeit bank bill, purporting to be the bill of a bank in the state of New York, a copy of the act of incorporation of such bank, and of a part of another additional act increasing the capital of the bank, certified by the deputy-secretary of state, under seal of the secretary's office, together with a certificate of the lieutenant-governor, under the privy seal of the state, that the same was authenticated in due form, and by the proper officer was offered in evidence; it was *held*, that both seals were seals of the state of New York, within the meaning of the act of congress of March, 1790; and that the evidence might go to the jury, open to any objections arising from the whole of the additional act not being produced. *Commonwealth v. Read*, 180.
 12. It is competent to prove, by parol testimony, the existence and acts of a corporation in another state. *Ib.*
 13. Where a part of a by-law of the town of Boston was read to support an indictment, it was *held*, that the whole of the by-law ought to be put into the case. *Commonwealth v. Worcester*, 100.
 14. Upon the trial of a person upon a complaint for having driven his horses and woodcart on a trot, through the streets of Boston, contrary to a by-law of the city, it was *held*, that evidence, to show that the mayor and the city marshal, in various conversations with the defendant and other persons, had said that the drivers of carts might drive at a moderate trot, was inadmissible. *Ib.*
 15. Evidence to show that the defendant had been, for several years, reputed to be a prudent and careful driver, was also excluded. *Ib.*
 16. Evidence to show that, if the drivers of woodcarts should be compelled to drive at a moderate footpace, it would tend to raise the price of wood, and so be prejudicial to the inhabitants of Boston, was also excluded. *Ib.*

17. Where, upon the trial of a deputy-sheriff, for receiving extorsive fees, it appeared that a writ was handed to the officer, upon which property was attached, and that, on the same day, another writ was handed to the officer in substitution for the other ; and that, upon a settlement between the parties to the suit, the first writ was returned to the plaintiff, and the last was retained by the officer, and not produced at his trial, and that the fees of the officer for a service had been paid ; it was *held*, that the jury might presume that the writ, if produced, would prove a legal service by the officer. *Commonwealth v. Dennie*, 165.
18. Where, in the trial of certain journeymen bootmakers, for a conspiracy to prevent master bootmakers from employing any journeyman who was not a member of a journeymen bootmakers' society, to which the defendants belonged, the counsel for the defence inquired of a witness the price of flour at the formation of the society, to show that the object of the defendants in forming their society, was to raise the price of wages in proportion to the price of flour and other necessities ; it was *held*, that such testimony was inadmissible. *Commonwealth v. Hunt*, 609.
19. Where, on the trial of a person for shop-breaking in the night time, it appeared in evidence, that violence had been offered to the door, and that it had been forced open ; it was *held*, that the jury might infer that the door had been duly closed on the night of the felony. *Commonwealth v. Merrill*, 1.
20. Where a party, at whose request a deposition *in perpetuum* was taken, omitted, in his application, to state that he was desirous to perpetuate the testimony of the witness, as prescribed by the Revised Statutes, c. 94, s. 34, but no objection was made for that reason, at the time of taking the deposition, and the notice of the magistrates to the deponent, and their certificate, showed that the deposition was taken *in perpetuum* ; it was *held*, that such deposition was not, for that cause, inadmissible. *Commonwealth v. Stone*, 604.
21. An unrecorded deposition *in perpetuum* is admissible to support an indictment for perjury against the deponent, at any time within the ninety days prescribed by the Revised Statutes, c. 94, s. 37, for recording such depositions, but not after that time has elapsed. *Ib.*
22. Where an indictment for perjury against a deponent, committed in giving a deposition taken *in perpetuum*, concluded with the following words : " as by his said answers to said interrogatories written in said deposition remaining, will, among other things, appear ; " it was *held*, that, upon the rejection of the deposition, parol evidence was inadmissible to prove the testimony of the deponent. *Ib.*
23. The contents of a letter, written by a prisoner, cannot be testified to by a witness for the prosecution, unless it is shown that the letter is de-

stroyed, or in possession of the prisoner. *Commonwealth v. Thompson*, 28.

24. Where a person was indicted for aiding and abetting another, in illegal voting, under the act of 1813, c. 68, knowledge that the principal was an unqualified voter, is not to be presumed in such case, but is to be alleged and proved like any other fact. *Commonwealth v. Aglar*, 412.
25. Where an indictment for perjury alleged that the defendant had conveyed an estate to B, which had been previously mortgaged to C ; that C had recovered a judgment, under the mortgage, for the possession of the estate ; that a petition for a review had been presented by B, by reason of newly discovered evidence to show a technical payment of the debt secured by the mortgage ; and that the defendant was guilty of perjury in testifying, at the hearing of the petition, that he had informed B, at the time of the conveyance, of the existence of the mortgage ; and the record of the proceedings at the hearing, offered in evidence at the trial, set forth, that the petition was for a review of a judgment " for the possession of the petitioner's mill-site and mills," whereas the indictment alleged that the judgment was " for possession of the land, mill-site and mills of B ; " and the record also set forth, that the petition was " for a review of a certain action and *supersedeas* and stay of execution," but the indictment alleged, that the petition was " for a review of a certain action and judgment ; " it was *held*, that as the indictment did not recite the record, such variances were no ground for the rejection of the testimony. *Commonwealth v. Farley*, 654.
26. *Held*, also, that although the indictment alleged, that the hearing was on the third day of April, before three of the justices of the supreme judicial court, when the record set forth that it was on the tenth day of April, before the supreme judicial court, the record was admissible. *Ib.*
27. *Held*, also, that any of the proceedings set forth in said indictment, as having occurred at said hearing, and not set forth in the record, might be proved *aliunde*. *Ib.*
28. *Held*, also, that where the indictment set forth that the parties were " at issue " at the hearing — no issue having been then there joined — the words were to be taken in their popular signification. *Ib.*
29. *Held*, also, that a question to the following effect : Did A, while upon the witness-stand, say anything relative to an outstanding mortgage, made by him to C upon the lands where the mill of the company stands, and concerning his telling H. and O. anything relating to it ; if yea, what ? was proper. *Ib.*

See BASTARDY, 3. COUNTERFEITING, 6, 10, 11. DUELLING, 2, 3, 4. EXTORTION, 2, 4, 5, 6. FALSE PRETENCES, 5. FORGERY, 6, 7. GAMING, 2, 3. CONFESSIONS. LIBEL, 6 to 20. LOTTERY, 3. NUISANCE, 1.

EX POST FACTO LAW.

Where, after a complaint had been instituted against a person for the violation of an ordinance of the city of Boston, in which complaint the charter of the city and the ordinance were not set forth, the legislature passed an act, declaring it sufficient to set forth the substance of complaints before the police court, without setting forth the special acts of the legislature, or the ordinances or by-laws of the city, on which they were founded; it was *held*, that the act did not operate as an *ex post facto* law, but only affected the forms of proceeding. *Commonwealth v. Bean*, 85.

EXTORTION.

1. Where, upon the trial of a deputy sheriff for receiving extorsive fees, it appeared that the property of the debtor, sold on execution, was sufficient to pay the officer's fees, but that they were paid by the creditor; it was *held*, that such fees were a charge to the debtor, and that the payment by the creditor was voluntary, and therefore that the officer was not guilty of extortion. *Commonwealth v. Dennie*, 165.
2. Where, upon the trial of a deputy sheriff for receiving extorsive fees, it was proved, that the money was not paid, but that a note was given by the debtor, which remained unpaid; it was *held*, that this would not authorize a conviction. *Ib.*
3. Where, upon such trial, it appeared that upon a settlement between the parties, it was agreed, that the defendants in the suit should pay for the service, and the plaintiff paid the officer his fees, and received the note of the defendants therefor; it was *held*, that the officer not being a party to such settlement, might rightfully demand his fees of the plaintiff, and that such payment was not voluntary in consequence of such agreement. *Ib.*
4. In the trial of an indictment of a deputy sheriff for charging extorsive fees, contrary to the act of 1795, c. 41, evidence of the construction put upon the statute by officers generally, is inadmissible. *Ib.*
5. Upon the trial of a deputy sheriff, for receiving extorsive fees in the service of a writ, proof must first be given of the existence of the writ and its delivery to the officer. *Ib.*
6. Where, upon the trial of a deputy sheriff, for receiving extorsive fees in the service of a writ and execution, the indictment set forth that the writ, upon which the execution was founded, bore date the twentieth day of a certain month; it was *held*, that a writ dated the tenth day of the same month, offered in evidence as the foundation of the execution, could not be admitted, and that the variance was fatal. *Ib.*

FALSE PRETENCES.

1. A keeper of an intelligence office, who agreed to procure a place for an

- applicant in consideration of two dollars paid in advance, but with no intention to procure such a place, and, by falsely alleging that he had a situation in view, induced the applicant to pay the money, was held to be guilty of obtaining money by false pretences within the statute of 1815, c. 136. [Rev. Stat. c. 126, s. 32.] *Commonwealth v. Parker*, 24.
2. The note of a minor is not property within the act of 1815, c. 136. (Rev. Stat. c. 126, s. 32.) *Commonwealth v. Lancaster*, 428.
3. Where, by means of false pretences, a party had obtained from a minor his note, which at the time of the prosecution was not due nor paid; it was held, that the offence of cheating by false pretences was not complete. *Ib.*
4. In the trial of an indictment, under the act of 1815; c. 143, for obtaining goods by false pretences from a mercantile firm, pretences proved to have been made to one partner were held to sustain the indictment. *Commonwealth v. Moser*, 410.
5. To convict a person indicted for obtaining goods under false pretences, it is sufficient for the jury to be satisfied, that the false pretences were a material inducement to the party to deliver the goods, and that without such pretences the goods would not have been delivered. *Commonwealth v. Hershell*, 70.

See EVIDENCE, 3, 4. NEW TRIAL, 3, 4. VERDICT, 4.

FEEES.

See EXTORTION.

FIRE.

1. The statute of 1804, c. 131, (Rev. St. c. 126,) by the term vessel does not mean a small, unfinished boat, still in the hands of the builder, and unfit for use. *Commonwealth v. Francis*, 240.
2. Setting fire to an unfinished boat in a shop, with intent to burn the building, is a misdemeanor at common law, but unless some permanent part of the building be burned, it does not come under the statute of 1804, c. 131. *Ib.*
3. Under the statute of 1804, c. 131, a vessel lies "within the body of the county," when it lies in the water which flows within the county, and not upon the high seas. *Ib.*

FORGERY.

1. To counterfeit any writing of a private nature, with a fraudulent intent, and whereby another may be prejudiced, is forgery at common law. *Commonwealth v. Chandler*, 187.
2. To forge a note or other private instrument in the name of a fictitious person, and for the purposes of fraud, is forgery under the statute. *Ib.*
3. Where an indictment alleged, that the defendant, contriving and intend-

ing to deceive one S. G. P. and to induce him to employ the defendant, and to pay him a large sum of money as wages, exhibited and delivered to the said S. G. P. a certain pretended certificate of good character, it was *held*, that this did not constitute forgery. *Ib.*

4. If a person passes a note as genuine, knowing it to be forged, the law infers that the intent was to defraud, because it is the natural consequence of the act. *Commonwealth v. Whitney*, 588.
5. If one signs the name of another to an instrument, with the honest belief that he had authority to do so, it negatives the intent to defraud. *Ib.*
6. Where, in an indictment for forgery, it was alleged that the act was done with intent to defraud one D. F.; it was *held*, that the intent to defraud D. F. was material, and must be proved. *Ib.*
7. On the trial of an indictment for forgery, it was *held*, that the record and judgment of the police court could not be used in evidence, unless the circumstances of the prisoner's examination there, were first shown by the magistrate or some other person present. *Commonwealth v. French*, 82.

See VERDICT, 1. WITNESS, 5, 7.

FOREIGN STATES.

See COUNTERFEITING, 1. DUELLING, 1. EVIDENCE, 12.

GAMING.

1. A person occupying one room only of a house, and keeping a *faro bank* therein, for public resort, is within the statute of 1798, c. 20, although the words of the statute are "keeping a house;" and although there be no proof of his paying rent for the room. *Commonwealth v. Hyde*, 19.
2. On the trial of an indictment for gaming, it is not necessary to prove the precise day, if the offence be proved to have been committed before the finding of the indictment. *Ib.*
3. The declarations of a person indicted for keeping a *faro bank*, made publicly at the time of the offence, that he was playing as the agent of another, are inadmissible as evidence in his defence. *Ib.*

See COUNTERFEITING, 2. INDICTMENT, 8.

GRAND JURY.

See INDICTMENT. ARREST OF JUDGMENT. BUILDINGS, 1.

FORFEITURE.

See GUNPOWDER.

GUNPOWDER.

1. Under the statute of 1820, c. 47, it was *held*, that gunpowder in a boat, driven within two hundred yards of the wharf, by the violence of the wind and waves, without the fault or negligence of the person having custody

of the same, and seized within an hour afterwards, was not thus rendered liable to forfeiture. *Trueman v. Gunpowder*, 14.

2. The same circumstances will excuse the omission to display a red flag, as required by the laws of the firewards of the city of Boston. *Ib.*
3. Under the statute of 1820, c. 47, the firewards have no authority to create a cause of forfeiture, which is not authorized by the act. *Ib.*
4. Where issue was joined on a plea of not guilty to a libel for a forfeiture of gunpowder, under the act of 1833, c. 151, and the jury returned that the gunpowder was had, kept and possessed, in a building contrary to the statutes, and the rules and regulations of the engineers, and that the claimant was not guilty; it was *held*, that the gunpowder was forfeited, and that the claimant was not liable for the costs of prosecution. *Barnicoat v. Gunpowder*, 596.

See PLEADING, 1.

INDICTMENT.

See VARIANCE. PREVIOUS INDICTMENT. ARREST OF JUDGMENT. COMPLAINT. INFORMATION.

1. Where the materiality of the evidence is averred in an indictment for perjury, and there is nothing in the record of the case in which the evidence, for which the defendant was indicted, was given, contradicting it, the indictment cannot be quashed for insufficiency. *Commonwealth v. Farley*, 654.
2. Where it appeared upon the face of an indictment that it was found "by the grand jurors of the commonwealth on their oath," and the county in which it was found, and the names of the jurors appeared upon the record, it was *held* to be sufficient. *Commonwealth v. Johnson*, 294.
3. In such case, the words "on their oath," are equivalent to the words "on their several oaths," and sufficient. *Ib.*
4. Where a trial had been commenced, and it was then discovered that the indictment was not signed by the foreman of the grand jury, it was *held*, that no further proceedings could be had on it, (although the counsel were willing to proceed.) *Commonwealth v. Sargent*, 116.
5. Where an indictment is signed by a juror, and it does not appear that he signed it as foreman, it is competent for the court to examine the records, to determine who was the foreman; and if such juror was the foreman, the indictment will be deemed good. *Commonwealth v. Reed*, 180.
6. Where a trial had been commenced, and it was then discovered that the indictment was not signed by the foreman of the grand jury, and the indictment was withdrawn from the jury, it was *held*, that they could not find another bill against the same persons, for the same offence, without the authority of the court. *Commonwealth v. Sargent*, 116.
7. Where there was a joinder of a felony with a misdemeanor under the statute, requiring different evidence to support the several charges and

different punishments, in case of conviction, the misjoinder was held to be fatal.

8. Where several persons keep a common gaming-house, they may be jointly or separately indicted, but if jointly indicted, they are to be considered as tried separately, and each is to pay the same penalty, and suffer the same consequences, as if it had been his sole act. *Commonwealth v. Hyde*, 19.

See COUNTERFEITING, 4, 5, 7, 9, 11. EVIDENCE, 1, 2, 4. JURISDICTION, 3. LARCENY, 4. LIBEL, 5, 8. LOTTERY, 4, 5. PERJURY, 4. SENTENCE. PROSECUTING OFFICER.

INFANT.

See FALSE PRETENCES, 2, 3. INTOXICATION.

INFORMATION.

See PLEADING, 3.

INTELLIGENCE OFFICE.

See FALSE PRETENCES, 1.

INSANITY.

See INTOXICATION.

INTOXICATION.

- A temporary mental derangement produced by drinking intoxicating liquor, under which a boy of thirteen years of age committed a theft, authorizes a jury to acquit him. *Commonwealth v. French*, 163.

JUDGES.

See PENALTY, 1. COURT. JURISDICTION.

JURISDICTION.

1. The municipal court has cognizance of cases of infringement of the by-laws of the city of Boston. *Commonwealth v. Nightingale*, 251.
2. A court has no cognizance of an offence for which it cannot inflict the extent of the punishment prescribed by the statute. *Commonwealth v. Curtis*, 202.
3. The police court of the city of Boston has no jurisdiction of a complaint for an assault and battery upon a constable, and rescuing from his keeping a prisoner in lawful custody; and a conviction upon such complaint, in that court, is not a bar to a prosecution by indictment. *Commonwealth v. Hyde*, 112.

4. Under the acts of 1783 and 1794, the police court of the city of Boston has jurisdiction of the offence of a riot, connected with an assault not of an aggravated character. *Commonwealth v. Twombly*, 222.
5. The police court of the city of Boston has jurisdiction of a complaint against a person for driving his horses and cart on a trot, through the streets, contrary to a by-law of the city. *Commonwealth v. Worcester*, 100.

See BASTARDY, 2.

JURY.

See JURORS. VERDICT. BY-LAW, 5. EVIDENCE, 11, 17, 19. FALSE PRETENCES, 5. MARKET, 2, 3. VOTING AND VOTERS, 7.

JURORS.

See CONTINUANCE. NEW TRIAL, 6, 7, 8. PENALTY, 1.

JUSTIFIABLE HOMICIDE.

1. Where, in case of a mutual conflict between two persons, one of them declines any further combat, and retreats as far as he can with safety, and then, through necessity and to avoid immediate death, kills his adversary; it is justifiable homicide. *Commonwealth v. Riley*, 471.
2. Where, in an affray, A. knocked down and beat B., and C., a bystander, believing that the life of B. was in danger, gave him a knife to defend himself, to prevent further mischief; it was held that C. was justified in giving B. the knife. *Id.*

KIDNAPPING.

The carrying away of a free black child, five years of age, against her will, from the family of the person by whom she had been formerly owned as a slave, and secreting her, is an offence within the Revised Statutes, c. 125, s. 20 and 21. *Commonwealth v. Robinson*, 488.

LARCENY.

1. If one, having no cause of action, sues out a writ for a fictitious demand, and so gets possession of the property of another, which he converts to his own use, and with intent to defraud the owner, it is larceny. *Commonwealth v. Low*, 477.
2. If one, having a right of action, makes use of a process, which he knows that he has no right to adopt, to get the property of his debtor, and with intent to defraud him, it is larceny. *Id.*
3. Where, upon the trial of an indictment for the felonious taking of a deed, it appeared that the defendant had contracted verbally to sell certain real estate to B.; that they met to settle the contract, and agreed upon a final meeting for that purpose; that in the meantime the defendant delivered to

B., confidentially, a deed, that he might ascertain its correctness, neither party considering the business settled; that B. gave the deed to his counsel to examine the title, and if satisfactory, to leave it at the registry to be recorded, which was done; that upon the meeting for a final settlement at the registry office, a dispute arose between the parties on a collateral point, and the defendant asked the register for the deed, and on receiving it, destroyed it, calling upon those present to witness the act; it was *held*, that if the defendant honestly thought that he had a right to the paper, the idea of a felonious intent was excluded. *Commonwealth v. Weld*, 157.

4. Where goods belonging to different persons are stolen at one time and place, the offence may be set forth in one count in the indictment. *Commonwealth v. Williams*, 84.
5. If, upon a settlement between a lessor and a lessee, under which an unexpired lease was to be given up by the lessor, upon the payment of a sum of money by the lessee, a misunderstanding arose as to the amount of money, and the lessee carried away the lease, the receipt for the money, and the money offered in payment; such taking was matter of civil controversy only. *Commonwealth v. Robinson*, 230.

LICENSE.

See BY-LAWS, 2.

LEGISLATURE.

See CONSTITUTIONAL LAW. EX POST FACTO LAW.

LIBEL.

See BLASPHEMY.

1. The English law of libel made part of the common law, and was used and practised upon by the courts in Massachusetts, before the adoption of the constitution. *Commonwealth v. Whitmarsh*, 441.
2. The legislature and the supreme judicial court of Massachusetts have repeatedly, since the adoption of the constitution, recognized libel as an indictable offence. *Id.*
3. The sixteenth article of the bill of rights did not repeal the common law of libel, as a criminal offence. *Id.*
4. The editor and publisher of a newspaper is answerable in law if its contents are libellous, unless the libellous matter was inserted by some one without his order and against his will. *Commonwealth v. Kneeland*, 346.
5. Where the matter set forth in an indictment for a newspaper libel does not amount to a libel, the defect cannot be supplied by other parts of the libellous publication. *Commonwealth v. Snelling*, 318.
6. In the trial of an indictment for a newspaper libel, evidence of the admissions of the editor of the newspaper as to the authorship of the publi-

- cation, made in the absence of the defendant, were *held* to be inadmissible, until a proper foundation by proof had been laid that the defendant was the author. *Commonwealth v. Guild*, 339.
7. The acknowledgment of the defendant is good evidence of the authorship of a libel. *Ib.*
 8. In admitting evidence of the truth of a libel, the court is guided by the libellous publication and not by the allegations in the indictment. *Ib.*
 9. Where, in the trial of an indictment for a libel, the publication set forth that one F. made certain statements of his own conduct while on a jury ; evidence of his conduct while in the jury room, as well as of what occurred there generally, was *held* to be inadmissible. *Ib.*
 10. Where the editor of a newspaper was indicted for the publication of a libel, and upon the trial a witness was asked, whether the editor, at the time of the publication, was not absent from town, and had no concern in the publication of the number containing the alleged libel ; it was *held*, that the question was proper, as going to the intent. *Commonwealth v. Buckingham*, 29.
 11. *Held* also, to be proper to ask a witness, whether, in his opinion, the alleged libellous words referred to the person alleged to be libelled. *Ib.*
 12. On the trial of an indictment for publishing a libel in a newspaper, calculated to bring into ridicule the Russian consul, it was *held* irrelevant to ask a witness, on the ground that the consul, by writing criticisms, &c., for the newspapers, made himself a fair subject for such a satire as the publication complained of, — whether “ the Russian consul did not attend at the theatre, some years ago, and assist and direct in getting up a ballet for public exhibition.” *Ib.*
 13. Where, on such trial, it appeared that the person alleged to be libelled was described in the publication as “ the representative of the emperor of the Russias,” and not as the “ Russian consul ; ” it was *held*, that evidence was admissible, in support of the averments in the indictment, to show that the publication applied to the Russian consul. *Ib.*
 14. Evidence of the truth of the publication, to rebut the charge of malice, is inadmissible, unless a good intent appears upon its face. *Ib.*
 15. Where, on the trial of an indictment for a newspaper libel upon the Russian consul, the libellous piece described the person as “ the representative of the emperor of the Russias,” without naming the Russian consul, or stating that such representative resided in Boston ; it was *held*, that evidence to prove the averment in the indictment, that the consul was the person referred to, was admissible. *Commonwealth v. Buckingham*, 51.
 16. On the trial of an indictment for a libel, which represented a person as having conducted disgracefully at a ball, it was *held*, that evidence of the circumstances which occurred at the ball, to rebut the allegation of malice in the indictment, was inadmissible. *Ib.*

17. In the trial of an indictment for a newspaper libel, a conversation between the person libelled and the defendant, which gave rise to the libellous publication, printed in the same newspaper with the publication, and to which the publication referred, was allowed to be read by the counsel for the government, in opening the case. *Commonwealth v. Snelling*, 318.
18. Where, under the act of 1826, c. 107, (Rev. St. c. 133, s. 6,) which allows the truth to be given in evidence, in the trial of indictments for libel, the defendant, by order of the court, furnished a specification of the facts intended to be proved under the act, evidence of facts not specified was held to be inadmissible. *Ib.*
19. Upon the trial of an indictment for a newspaper libel, charging a justice of a court with official misconduct, letters addressed to him by his associate justices, offered in evidence to show their opinions in regard to the administration of justice, in certain cases, in such court, were held to be inadmissible. *Ib.*
20. Upon the trial of an indictment for a libel, which charges only official misconduct, no evidence of private misconduct can be introduced. *Ib.*
21. Where the editor of a sectarian newspaper publishes an obituary notice, in which it is stated, that the deceased never used profane language, the intention of the notice being to promote certain religious views; it is the right of the editor of another sectarian newspaper, if he believes such notice to be injurious, to state in his newspaper, that the deceased was a profane swearer, if such was the case, and if such statement is made simply to counteract what is believed to be the mischief of the notice. *Commonwealth v. Batchelder*, 191.

See VARIANCE, 1. VERDICT, 3.

LOTTERIES.

1. A person selling a chance in a lottery, and retaining in his own hands the ticket or other evidence of the chance, sells a ticket within the meaning of the statute of 1825, c. 184. *Commonwealth v. Pollard*, 290.
2. Where, upon the trial of an indictment for selling lottery tickets, it is proved that the defendant sold the tickets by a clerk or other agent, the jury will be authorized to convict the defendant. *Commonwealth v. Braynard*, 146.
3. If a person send to a printer to be inserted in his newspaper, an advertisement of lottery tickets for sale, he is guilty of advertising and causing to be advertised, as set forth in the statute of March, 1826. *Ib.*
4. When, under the statute of 1825, c. 18, the indictment charged that the defendant "did unlawfully offer for sale and did unlawfully sell a lottery ticket," it was held that this constituted but one offence. *Commonwealth v. Johnson*, 284.
5. In an indictment for selling lottery tickets in a state where no lotteries are authorized by law, it is not necessary to give the name of the lottery; or to set forth the tenor of the ticket, which never was in the power of the grand jury. *Ib.*

See EVIDENCE, 1. PROSECUTING OFFICER.

MARKET.

1. The city ordinance, passed November 13, 1826, for the due regulation of the market, is valid and binding upon the citizens of the commonwealth. *Commonwealth v. Nightingale*, 251.
2. In a complaint under this ordinance it is competent for the jury to settle from the evidence, whether the defendant resides in a town in the vicinity of Boston. *Ib.*
3. When the defendant offered for sale in the market, produce of his own and neighboring farms, it was held that the jury were to decide whether it was intended as a cover for selling produce not of that description. *Ib.*

MAYOR AND ALDERMEN.

1. Under the statute of 1833, c. 68, (Rev. St. c. 4, s. 11,) and the twenty-third chapter of the charter of the city of Boston, it is an indictable offence for the mayor and aldermen of the city to omit, through carelessness, to return any votes cast at an election of a member of congress in said city. *Commonwealth v. Mayor and Aldermen*, 298.
2. Under the statute of 1833, c. 68 and 141, and the twenty-third section of the charter of the city of Boston, the mayor and aldermen of the city may make up their certificate of votes cast at an election of a member of congress in said city, at any time within ten days after the day of the election. *Ib.*
3. Where the mayor and aldermen of the city of Boston had returned a certificate of the votes cast in said city, at an election of a member of congress, to the governor and council, and before ten days after the day of the election had elapsed, an error in such return was discovered; it was held, that, under the city charter, and the statute of 1833, c. 68 and 141, the return might be amended at any time within the ten days. *Ib.*

See BY-LAWS, 5. CONSTITUTIONAL LAW, 4. EVIDENCE, 8, 9.

MISDEMEANOR.

See FIRE, 2.

MISJOINDER.

See INDICTMENT, 7.

MISNOMER.

When a misnomer in an indictment is pleaded in abatement, it is not a good replication that the defendant is the same person mentioned in the indictment. *Commonwealth v. Dockham*, 238.

MUNICIPAL COURT.

See JURISDICTION. BASTARDY, 2.

NEW TRIAL.

1. Where, in the trial of a case, the fact of the assignment of a judgment to the defendant became of consequence, and the attorney for the commonwealth denied the existence of the judgment, which denial the opposing counsel and the court did not understand him to make ; and parol evidence to show that such judgment had become the property of the defendant, was rejected by the court ; and where it appeared, on application for a new trial, that such judgment was indorsed and made payable to bearer, and that time would have been allowed by the court for the production of such judgment, if the attorney for the commonwealth had been understood to deny its existence ; a new trial was granted. *Commonwealth v. Randall*, 500.
2. Evidence that a witness used expressions, after a trial, contradicting his testimony in court, is not ground for a new trial. *Ib.*
3. Where property was obtained by false pretences, and the defendant failed to show at the trial what he had done with it or with the proceeds ; it is not sufficient ground to authorize a new trial, that he is now desirous to prove that fact, and expects that it would influence the jury in his favor. *Commonwealth v. Benesh*, 684.
4. Where, in the trial of an indictment for obtaining goods by false pretences, a book was produced in evidence, in which the representations made by the defendant, at the time of procuring the goods, were recorded, and after conviction the counsel for the defence moved for a new trial, because, since the trial, it had been discovered, upon the examination of the book, that the entry made therein of such representations by the prosecutor, and sworn to by him as having been entered at the time they were made, was in fact entered many weeks after the making of such representations ; and because the jury were misled by the statements of such prosecutor, and of the prosecuting officer in relation to the time of such entry ; it was *held* that this was no ground for a new trial. *Ib.*
5. If the party or his counsel failed in diligence in preparing for the trial, or if there was a difference in opinion between them as to the best mode of defence, and there was no surprise, a new trial will not be granted. *Ib.*
6. Where, after a jury had retired to consult on their verdict, they sent a note in writing to the judge, in the absence of parties and counsel, requesting advice on certain points in the case, and the judge returned the writing without reply, and directed the officer to hand a volume of reports to the foreman, and to request him to read a part of a decision, to the effect that a jury in such circumstances could not communicate with the judge except in open court ; it was *held* that this was not a sufficient ground for a new trial. *Commonwealth v. Jenkins*, 118.
7. Where, in the trial of a case in which the jury were to decide upon both law and fact, the officer in attendance delivered to them, at their re-

quest, without application to the court, after they had retired to consult upon a verdict, a volume of the laws of the commonwealth, containing the act upon which the indictment was founded, which act had been commented on by the counsel and by the court, and which volume the court would have given them leave to take with them, if requested; it was *held*, that this was not a sufficient ground for a new trial. *Ib.*

8. Where, after a jury had retired under the attendance of an officer, and before the court adjourned another officer was sworn to attend upon them, and after the adjournment a third was sworn by the clerk to supply the place of the second for a few minutes; it was *held*, that this was according to usage, and no ground for a new trial. *Ib.*

See VERDICT, 1, 3, 4.

NOLLE PROSEQUI.

After a jury has been empaneled to try the issue, the indictment cannot be withdrawn from them, upon the entry of a *nolle prosequi* by the commonwealth's attorney, without the consent of the defendant. *Commonwealth v. Goodenough*, 132.

NOTICE.

See BUILDINGS, 1.

NUISANCE.

1. Where a wharf is extended below low water mark, and into the channel of the tide waters of the commonwealth, it does not necessarily follow that it is a common nuisance and must be abated, but this is the presumption, and the defendant must show that it is no impediment to navigation, or detriment to the public. *Commonwealth v. Wright*, 211.
2. If the effect of such wharf is to fill up the channel, or injuriously divert the current, it is a nuisance. *Ib.*

See BY-LAWS, 5.

OFFICER.

See SHERIFF. CONSTABLE. PROSECUTING OFFICER. CASHIER. NEW TRIAL, 6, 7, 8.

PARTNERSHIP.

See FALSE PRETENCES, 4.

PENALTY.

Upon a trial, under the ordinance of the city council of the city of Boston, of 1824, regulating the keeping of dogs, and directing one half the amount paid for a license to be paid to the city clerk, and one half of the penalty

for the violation of the ordinance to be paid to the prosecutor, without declaring to what use the other half should be applied; it was *held*, that it could not be inferred, that any sum enures to the city, although it was stated, in the original complaint, that the other half of the penalty was for the use of the city, and, consequently, that the justices of the police and municipal courts and the jurors were not interested by reason of being paid by the city. *Commonwealth v. Bean*, 85.

See BUILDINGS, 1. BY-LAWS, 6. CONSPIRACY, 1. CONSTITUTIONAL LAW, 2. Ex POST FACTO LAW. INDICTMENT, 8.

PERJURY.

1. Where, under the Rev. St. c. 36, s. 65, regulating the returns to be made by the officers of banks, a cashier swears that the return made by him, "is, according to his best knowledge and belief, true," knowing at the time that it is false, and taking the oath deliberately, he is guilty of perjury, under the Rev. St. c. 128, s. 2. *Commonwealth v. Dunham*, 519.
2. Under the Rev. St. c. 36, s. 65, the return of the cashier must be founded on the books of the bank, and must contain a true statement of the condition of the bank, at the time of the making of the return; but if the return is substantially true, and gives a fair exhibit of the condition of the bank at the time, though it may not be indicated by the books, the cashier, in swearing to such return, is not guilty of perjury. *Ib.*
3. The Revised Statutes of Massachusetts, c. 128, have not altered the offence of perjury at the common law; and in every case of perjury, materiality is still an element of the offence. *Commonwealth v. Farley*, 654.
4. Where A conveyed an estate to B, which had been previously mortgaged to C, and a judgment was recovered by C, under the mortgage, for the possession of the estate, and a petition for a review was afterwards filed by B, setting forth the discovery of new evidence, showing a technical payment of the debt secured by the mortgage, and A testified, at the hearing of the petition, that he notified B, at the time of such conveyance, of the existence of the mortgage; and A was afterwards indicted for perjury in so testifying, and a motion was made, before plea, to quash the indictment, by reason of the immateriality of such evidence to the main issue at the hearing; it was *held*, that such evidence was pertinent, if not material, and the motion was denied. *Ib.*

See SPECIFICATION. EVIDENCE, 21, 22, 25, 26, 27, 28, 29. INDICTMENT, 1. WITNESS, 9, 10.

PETITION FOR REVIEW.

See PERJURY, 4. WITNESS, 9.

PLEADING.

See MISNOMER. PREVIOUS ACQUITTAL. PREVIOUS CONVICTION. NUISANCE.

A plea of not guilty to a libel for the forfeiture of gunpowder, under the act of 1833, c. 151, by the claimant in whose possession the gunpowder was found, puts the truth of the libel at issue, both as to the liability of the gunpowder to forfeiture, and as to the guilt of the claimant. *Barnicoat v. Gunpowder*, 596.

PREVIOUS ACQUITTAL.

Where a party relies on the plea of a former acquittal, it must appear from the records, that the offences were one and the same ; and that it was described in the first indictment, so that judgment could have been rendered on it, upon conviction of the defendant. *Commonwealth v. Goodenough*, 132.

PREVIOUS CONVICTION.

A plea of previous conviction cannot be sustained, unless it appear that under the first indictment or complaint, the real merits could have been tried, and the defendant was actually in jeopardy. *Commonwealth v. Curtis*, 202.

See JURISDICTION, 3.

PREVIOUS INDICTMENT.

It is no sufficient bar to an indictment, that the defendant has been arraigned at a previous term for the same offence, and that the former indictment is still pending ; but the prosecuting officer must elect on which of the indictments he will proceed to trial. *Commonwealth v. Dunham*, 513.

PRINCIPAL.

See ACCESSARY. DUELLING.

PROSECUTING OFFICER.

Where, upon the trial of an indictment for selling lottery tickets, certain witnesses for the commonwealth presented an affidavit to the court, setting forth that they believed that indictments for selling lottery tickets had been returned against them, but that, to their knowledge, no process had been issued upon them, and that it was necessary that they should inspect these indictments, that they might be better advised of their duty as witnesses in the case on trial ; it was *held*, that the delay in the issuing of process, in such cases, was within the sound discretion of the public prosecutor ; that unless the contrary was shown, the court would presume that he deemed the delay necessary ; and that the indictments should not be open to inspection. *Commonwealth v. Braynard*, 146.

See BUILDINGS, 2. NEW TRIAL, 4. PREVIOUS INDICTMENT. SENTENCE. SPECIFICATION.

RECOGNIZANCE.

See SENTENCE.

INDEX.

RECORD.

See EVIDENCE, 10, 25, 27. FORGERY, 7. PREVIOUS ACQUITTAL.

RIOT.

On the trial of persons indicted for a riot, a count of the indictment setting forth that they with others riotously assembled, to the disturbance of the public peace, and then riotously began to pull down a certain dwelling-house, was *held* to be sufficient, although it did not state the unlawful act which they assembled to commit. *Commonwealth v. Jenkins*, 118.

See JURISDICTION, 4.

SEALS.

See EVIDENCE, 11.

SENTENCE.

Where a defendant pleaded guilty to an indictment, and the prosecuting officer did not move for sentence, but laid the indictment on file, and the defendant was permitted to go at large, on a recognizance to appear when sent for; and at a future day, after several intervening terms of the court, the prosecuting officer moved for sentence: it was *held*, that the indictment was still in force; and that the defendant was rightly sentenced upon her plea. *Commonwealth v. Chase*, 267.

See VERDICT, 1, 2.

SHERIFF.

See OFFICER. ATTACHMENT. EXTORTION. EVIDENCE, 17.

SHOP-BREAKING.

See EVIDENCE, 19.

SIDEWALK.

See BY-LAWS, 3, 4. WAY.

SOUTH BOSTON.

See BY-LAWS, 4.

SPECIFICATION.

Where an indictment for perjury, in swearing to a false return of the condition of a bank, charged, generally, that the return was false; it was *held*, that the county attorney was not bound to specify in what particulars he expected to prove the return to be false. *Commonwealth v. Dunham*, 519.

See LIBEL, 18.

STREETS.

See WAY.

VARIANCE.

1. Where, in an indictment for libel, one count set forth the publication of a libel, "in the following false, scandalous and defamatory words;" the omission, in the recital following, of the word "evening," after the word "Tuesday," which occurred in the original publication, was *held* to be a fatal variance. *Commonwealth v. Buckingham*, 29.
2. The omission of the final *e* in the word "*Keene*," in an indictment, is not a fatal variance. *Commonwealth v. Riley*, 67.

See EVIDENCE, 25, 26, 28. EXTORTION, 6.

TAX.

See BY-LAWS, 2, 3.

VERDICT.

1. Where, in the trial of an indictment for the forgery of a receipt and discharge for rent, by the altering of 10 dollars to 100, and by adding after the word "rent" the words "for one year from date," the jury returned that the defendant was guilty of fraudulently obtaining a receipt for one hundred dollars, for which he paid only ten dollars, and that the words "from date" had been added to the same; it was *held*, that such verdict did not justify a sentence, and that a new trial should be granted. *Commonwealth v. Canfield*, 510.
2. *Held also*, that although such verdict was amended, by consent of parties, by adding that the jury submitted to the court, whether the facts returned constituted a crime in law,—their verdict to be rendered according to such decision,—such consent did not justify a sentence. *Ib.*
3. Where, on an indictment for a libel, the jury returned a special verdict, that the defendant did publish, &c., and that he did the same without malice, but with no justifiable motive; it was *held* that this could not be considered as a verdict either of guilty or not guilty, and that a new trial must be ordered. *Commonwealth v. Guild*, 329.
4. Where, in the trial of an indictment for obtaining goods by false pretences, the jury returned "that the prisoner was guilty of unlawfully and fraudulently obtaining goods under false pretences," and the foreman stated that the jury could not agree on the fact of the intent; the court ordered a new trial. *Commonwealth v. Moor*, 410.

See NOLLE PROSEQUI. GUNPOWDER, 4.

VOIRE DIRE.

See WITNESS.

VOTING AND VOTERS.

1. Under the act of 1813, c. 68, against illegal voting, a person, to come within the statute, must know, at the time of his voting, that he is not a

qualified voter, and that he is doing, or attempting to do an unlawful act. *Commonwealth v. Aglar*, 412.

2. To constitute a wilful aider and abetter in such an offence under the act, he must know at the time, that the principal was an unqualified voter, and had no right to vote; and with such knowledge, he must have said or done something designed and calculated to encourage him to vote. *Ib.*
3. If a foreigner honestly believes, at the time of voting, that he has a right to vote, it is not a wilful act within the statute. *Ib.*
4. So, if the aider and abettor honestly believes that the foreigner had a right to vote, he is entitled to an acquittal. *Ib.*
5. Although the name of an unqualified person may be borne on the list by mistake, it will not authorize him to vote. *Ib.*
6. The name on the list will justify the inspectors to receive his vote. But if they refuse to receive the vote of an unqualified person, although it is borne on the list, it would be no injury to him, nor just ground of complaint. *Ib.*
7. Where one votes at an election, whose name is upon the list of voters, when he is not legally qualified to vote, it is a question of fact for the jury, whether he committed the offence wilfully. *Commonwealth v. Wallace*, 592.

See MAYOR AND ALDERMEN. EVIDENCE, 8, 9, 10, 24.

WAY.

1. The statute of 1833, c. 128, empowering the surveyors of highways in the city of Boston to regulate the width and height of sidewalks, repealed no prior statute. *Commonwealth v. Goddard*, 420.
2. The statutes of 1786, c. 81, and 1796, c. 58, (Rev. St. c. 25,) relating to highways, do not apply to the city of Boston. *Ib.*

See BY-LAWS, 3, 4, 5.

WHARF.

See NUISANCE.

WITNESS.

1. If an objection is taken to a witness on account of his religious sentiments, such sentiments should be proved by other witnesses. *Commonwealth v. Batchelder*, 191.
2. A person believing in the being of God, and in his attributes, as a righteous avenger of wickedness, and in the existence of a future state, is competent to be sworn as a witness. *Ib.*
3. Where, upon objection to a witness for defect of religious faith, he stated at first that he believed in a God; and afterwards that he did not consider an oath more binding upon his conscience than a simple promise, that he

- attached no religious obligation or sanctity to an oath, and that he had no idea of a God who knows the secrets of all hearts, and who rewards and punishes men according to their conduct; such witness was *held* to be incompetent. *Commonwealth v. Barnard*, 431.
4. After the incompetency of a witness, on account of a defect of religious belief, has been established by testimony, he cannot be sworn upon the *voire dire* to restore his competency by his own declarations. *Commonwealth v. Wyman*, 432.
 5. Upon the trial of an indictment for forging and uttering a counterfeit bank-bill, the cashier of the bank, from which such bill purported to be issued, was *held* to be a competent witness to the forgery. *Commonwealth v. Read*, 180.
 6. Where an officer would be liable, as a trespasser, for arresting a prisoner, if arrested wrongfully, the objection to the officer as a witness, on the trial of the prisoner, goes only to his credibility, and not to his competency. *Commonwealth v. Merrill*, 1.
 7. Where, in the trial of an indictment for forgery, a paper was handed to a witness, with all the writing but the signature concealed, and the witness asked whether the signature was his; it was *held*, that the witness was not bound to answer, without first seeing the contents of the paper. *Commonwealth v. Whitney*, 588.
 8. A jury may convict on the evidence of an accomplice alone, if they give full credit to it; but it is most proper to acquit, where the testimony of the accomplice is not corroborated in material circumstances. *Commonwealth v. Grant*, 438.
 9. Where A conveyed an estate to a manufacturing company, which had been previously mortgaged to C, and a judgment was recovered by C, under the mortgage, for the possession of the estate, and a petition for a review was afterwards filed by the company, at the hearing of which, A testified, that he notified the company, at the time of such conveyance, of the existence of the mortgage, and was afterwards indicted for perjury in giving such testimony, and upon his trial, when the debt which was secured by the mortgage, was still unpaid by the company, a stockholder of the company, who had been instrumental in procuring the indictment against A, was offered as a witness; it was *held*, that the interest of such witness went to his credibility, and not to his competency. *Commonwealth v. Farley*, 654.
 10. In the trial of an indictment for perjury, in testimony given in court, a witness who heard all but a small portion of such testimony, was *held* to be competent. *Ib.*
 11. It is the province of the court to judge whether a direct answer to a question may tend to criminate a witness. *Commonwealth v. Braynard*, 146.

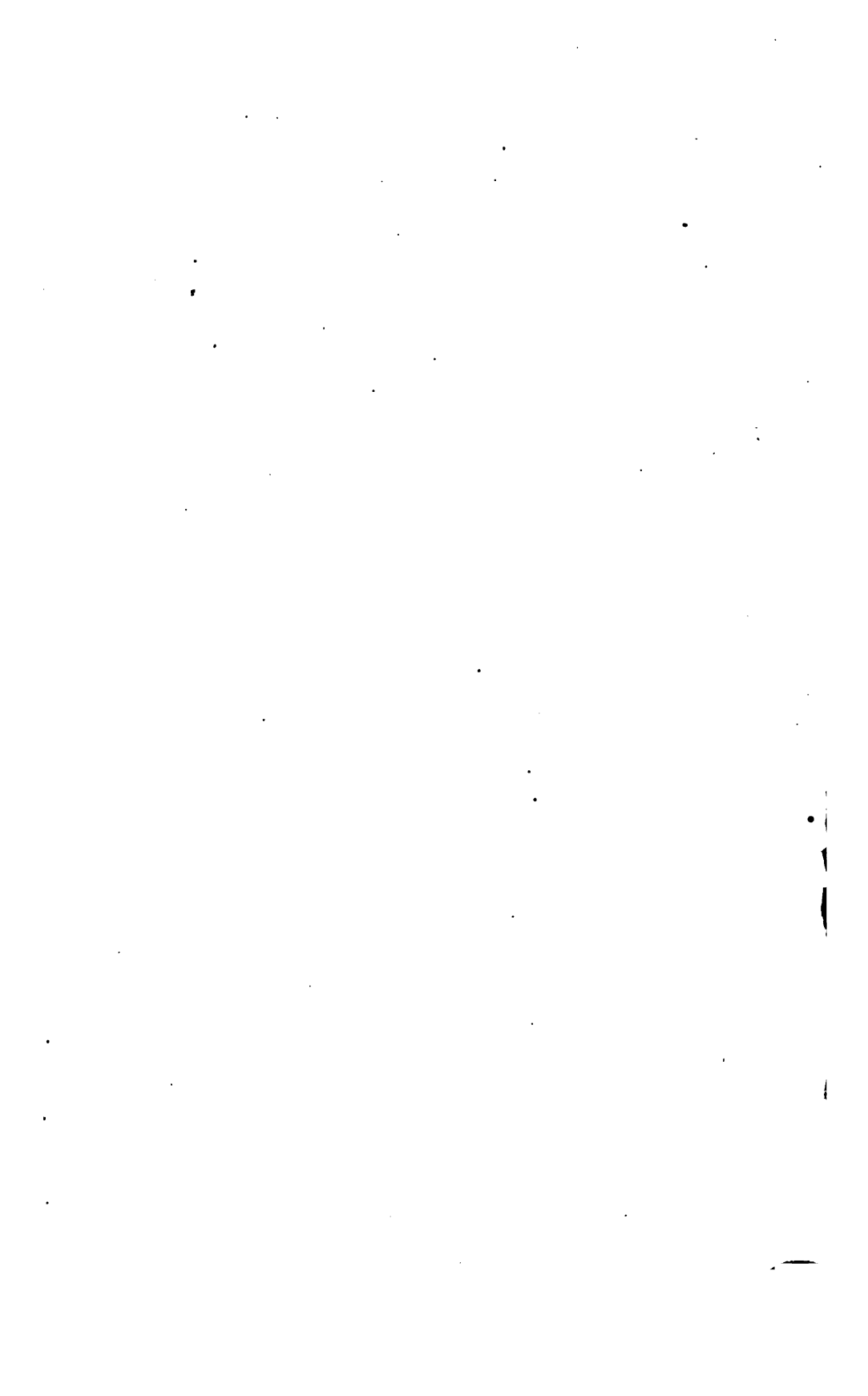
See NEW TRIAL, 2.

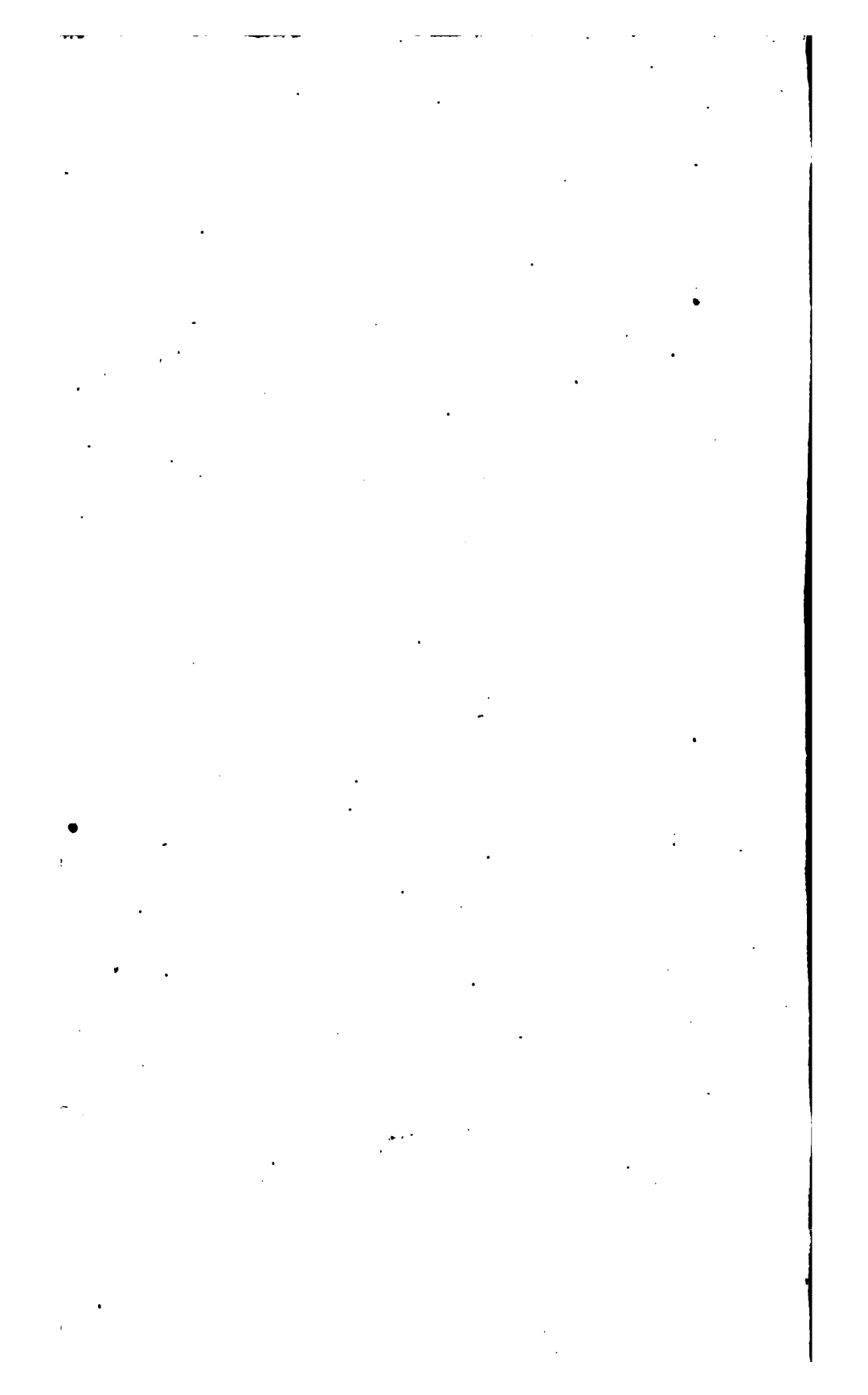
ERRATA.

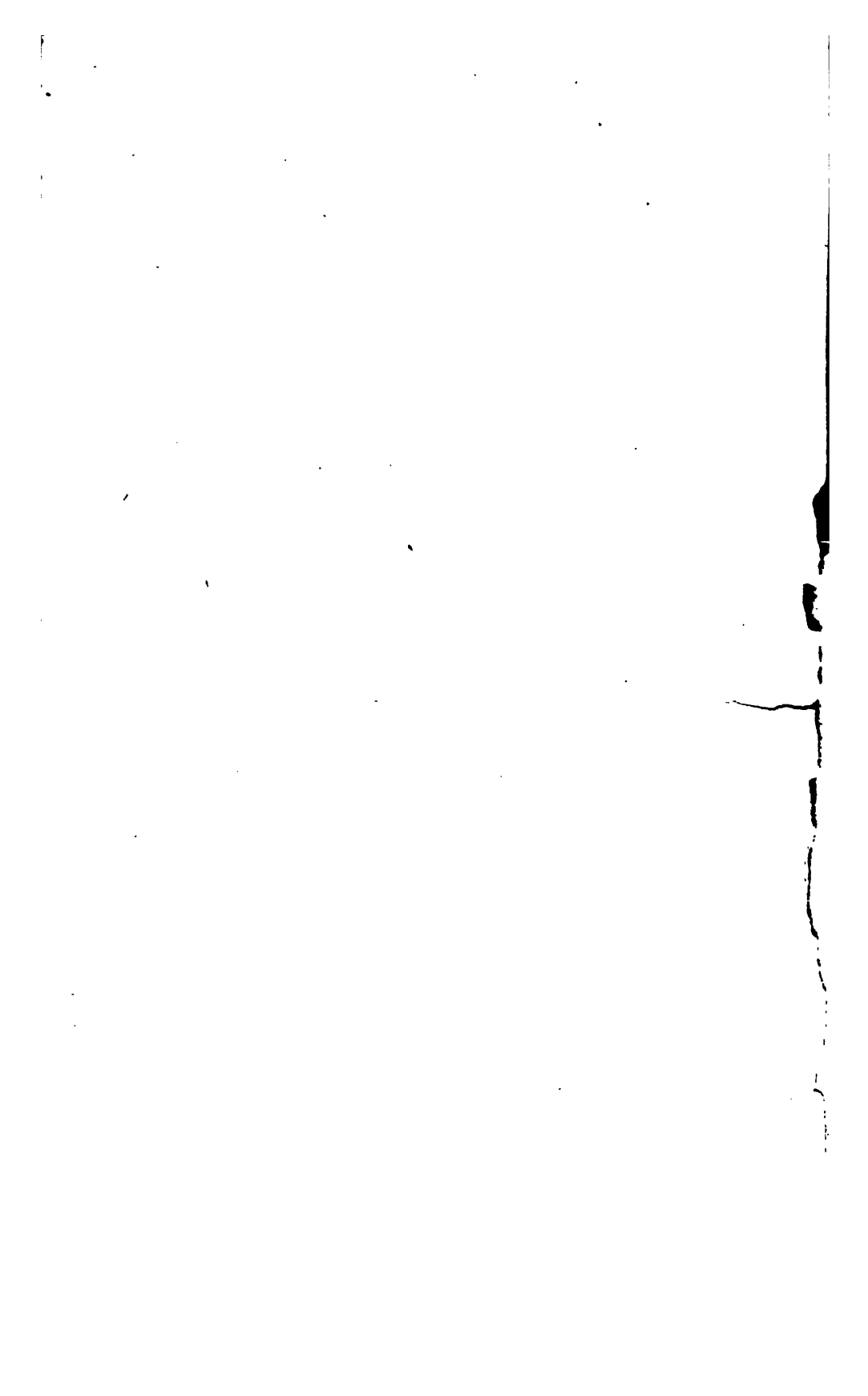
On page 19, for 1825 read 1823.

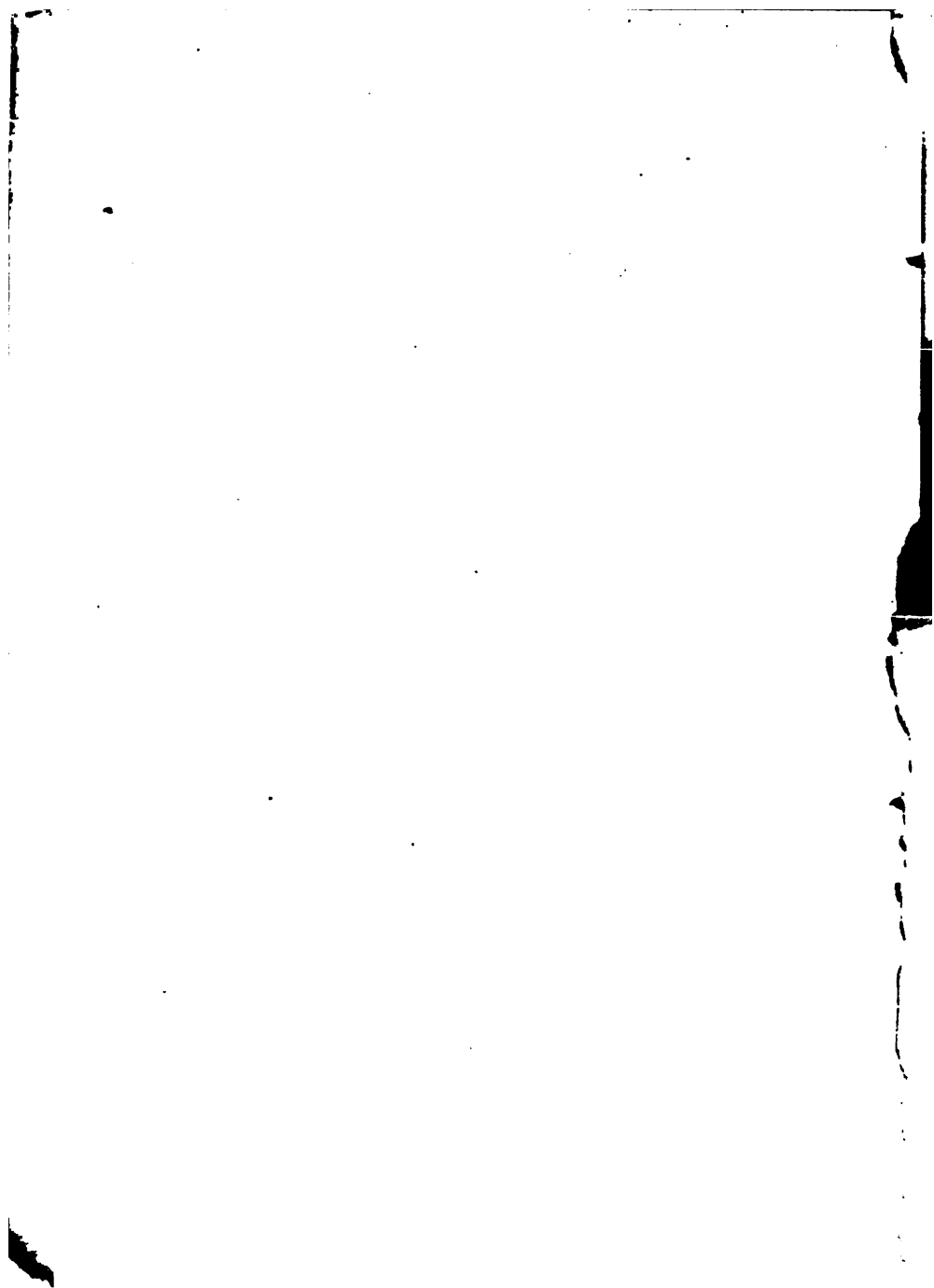
" " 82, *note*, after "*conviction*," read *of this nature*.

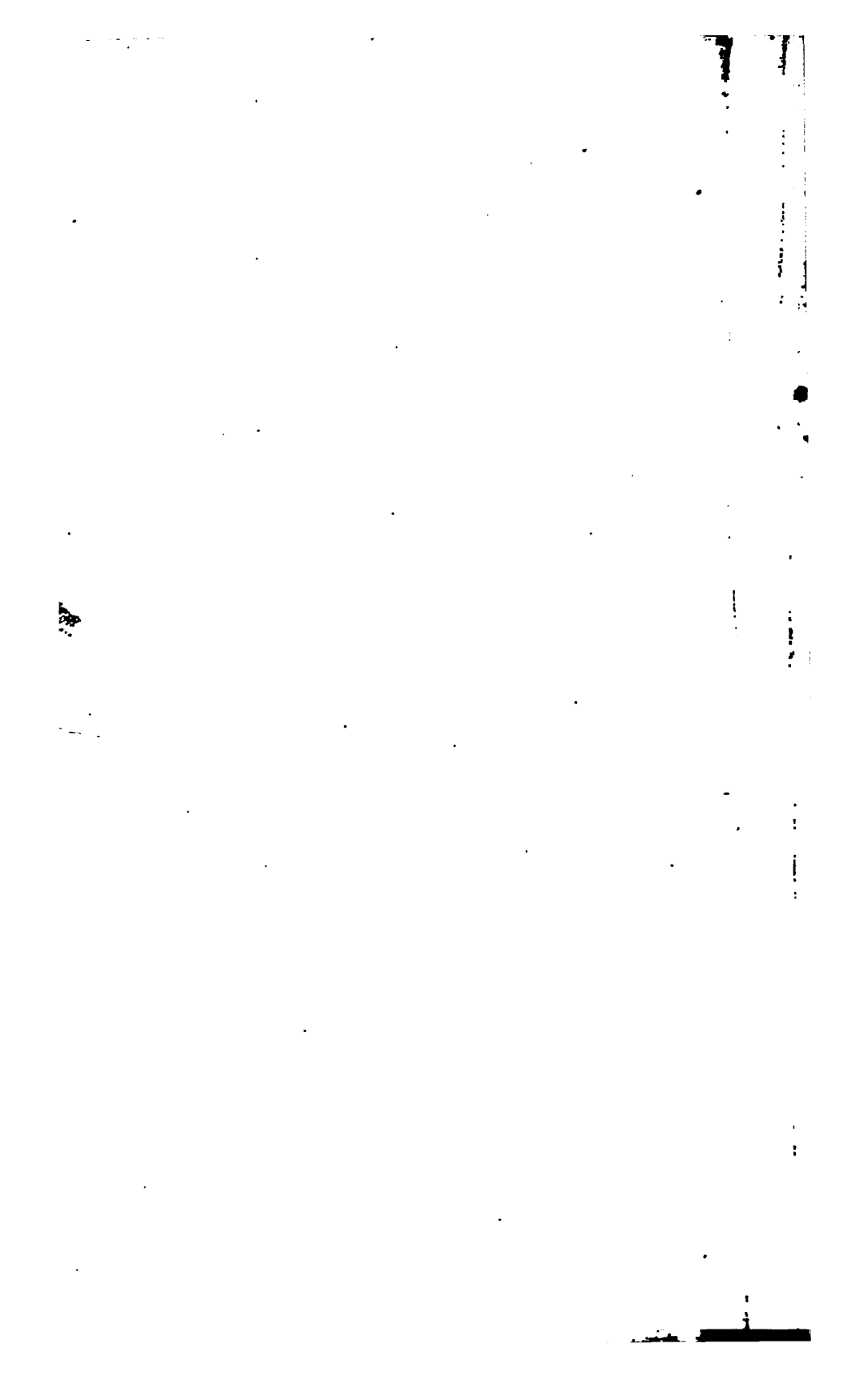
In index, under *Constitutional Law*, read: "The fifth section of the act of 1824, c. 28, which enacts that in cases of a complaint for fast driving in the streets of the city of Boston, it shall not be necessary to set forth the by-law in the indictment, is not in violation of the sixth article of the bill of rights. *Commonwealth v. Worcester*, 100."











Stanford Law Library



3 6105 063 584 101